ANNOTATIONS INCLUDE 229 N. C.

NORTH CAROLINA REPORTS

VOL. 170

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1915

(IN PART)

BY

ROBERT C. STRONG

STATE REPORTER

ANNOTATED

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

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6 Jones Law	"	51	"
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OF THE

SUPREME COURT OF NORTH CAROLINA

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ASSOCIATE JUSTICES:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

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.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
M. H. Justice	Eighteenth	Rutherford.
Frank Carter	Ninteenth	Buncombe.
G. S. Ferguson	Twentieth	Haywood.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
John H. Kerr	Third	Warren.
Walter D. Siler	Fourth	Chatham.
Charles L. Abernethy	Fifth	Carteret.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
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.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1916

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	29
Second District	September	5
Third and Fourth Districts	September	12
Fifth District	September	19
Sixth District	September	26
Seventh District	October	3
Eighth and Ninth Districts	October	10
Tenth District	October	17
Eleventh District	October	24
Twelfth District	October	31
Thirteenth District	November	7
Fourteenth District	November	14
Fifteenth and Sixteenth Districts	November	21
Seventeenth and Eighteenth Districts	November	28
Nineteenth District	December	5
Twentieth District	December	12

SUPERIOR COURTS, FALL TERM, 1916

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Whedbee.*

Camden—July 17† (1); Nov. 6 (1).
Gates—July 31 (1); Dec. 11 (1).
Washington—Aug. 7 (1).
Currituck—Sept. 4 (1).
Chowan—Sept. 11 (1); Dec. 4 (1).
Pasquotank—Sept. 18 (1); Sept. 25† (1); Nov. 13† (1).
Beaufort—Oct. 2† (2); Nov. 20 (1); Dec. 18† (1).
Hyde—Oct. 16 (1).
Dare—Oct. 23 (1).
Perquimans—Oct. 30 (1).
Tyrrell—Nov. 27 (1).

SECOND JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Allen.*

Nash—Aug. 28 (1); Oct. 9 (1); Nov. 27 (2).
Wilson—Sept. 4 (1); Oct. 2 (1); No. 13† (2); Dec. 18* (1).
Edgecombe—Sept. 11 (1); Oct. 30† (2).
Martin—Sept. 18 (2); Dec. 11 (1).

THIRD JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Cooke.*

Bertie—July 3† (1); Aug. 28 (2); Nov. 13 (1).
Hertford—July 31 (1); Oct. 16 (2).
Northampton—Aug. 7 (1); Oct. 30 (2).
Halifax—Aug. 14 (2); Nov. 27 (2).
Warren—Sept. 18 (2).
Vance—Oct. 2 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Rountree.*

Lee—July 17 (2); Oct. 23† (1).
Chatham—Aug. 7† (1); Oct. 30 (1).
Johnston—Aug. 14* (1); Sept. 25† (2); Dec. 11 (2).
Wayne—Aug. 21 (2); Oct. 9† (2); Nov. 27 (2).
Harnett—Sept. 4 (1); Sept. 11† (1); Nov. 13† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Lyon.*

Pitt—Aug. 21† (1); Aug. 28* (1); Sept. 18 (1); Nov. 6† (1); Nov. 13* (1); Nov. 20† (2).
Craven—Sept. 4* (1); Oct. 2† (2); Nov. 20† (2).
Carteret—Oct. 16 (1).
Pamlico—Oct. 23 (2).
Jones—Dec. 4 (1).
Greene—Dec. 11 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Devin.*

Onslow—July 17† (1); Oct. 9 (1); Dec. 4† (1).
Duplin—July 24* (1); Aug. 28† (2); Nov. 20 (1); Nov. 27† (1).
Sampson—Aug. 7 (2); Sept. 18† (2); Oct. 23 (2).
Lenoir—Aug. 21* (1); Oct. 16‡ (1); Nov. 6† (2); Dec. 11* (1).

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Bond.*

Wake—July 10* (1); Sept. 11* (1); Sept. 18† (3); Oct. 9* (1); Oct. 23† (2); Nov. 6* (1); Nov. 27† (1); Dec. 4* (1); Dec. 11† (1).
Franklin—Aug. 28† (2); Oct. 16* (1); Nov. 13† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Connor.*

Brunswick—Aug. 21† (1); Oct. 9 (1).
Columbus—Aug. 28 (2); Nov. 20† (2); Dec. 8* (1).
New Hanover—Sept. 11* (2); Oct. 23† (2); Nov. 13 (1); Dec. 4† (2).
Pender—Sept. 25† (2); Nov. 6 (1).

NINTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Peebles.*

Robeson—July 10* (1); Sept. 4† (2); Oct. 2† (2); Nov. 6* (1); Dec. 4† (2).
Bladen—Aug. 7* (1); Oct. 16† (1).
Hoke—Aug. 14 (1); Nov. 27 (1).
Cumberland—Aug. 28* (1); Sept. 18† (2); Oct. 23† (2); Nov. 20* (1).

TENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Daniels.*

Granville—July 24 (1); Nov. 13 (2).
Person—Aug. 14 (1); Oct. 16 (1).
Alamance—Aug. 21* (1); Sept. 11† (2); Nov. 27* (1).
Durham—Aug. 28* (1); Sept. 25† (2); Nov. 6† (1); Dec. 11* (1).
Orange—Sept. 4 (1); Dec. 4 (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Long.*

Ashe—July 10 (2); Oct. 16 (1).
Forsyth—July 24* (2); Sept. 11† (2); Oct. 2 (2); Nov. 6† (2); Dec. 11* (1).
Rockingham—Aug. 7* (2); Nov. 20† (2); Dec. 18* (1).
Caswell—Aug. 21 (1); Dec. 4 (1).
Surry—Aug. 28 (2); Oct. 23 (2).
Alleghany—Sept. 25 (1).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Webb.*

Davidson—July 31 (2); Nov. 20† (2).
Guilford—Aug. 14† (2); Sept. 4† (2); Sept. 18* (1); Sept. 25† (1); Oct. 9† (2); Nov. 6† (2); Dec. 4† (1); Dec. 11* (2).
Stokes—Oct. 23* (1); Oct. 30† (1).

THIRTEENTH JUDICIAL DISRICT

FALL TERM, 1916—*Judge Cline.*

Richmond—July 3† (1); July 17* (1); Sept. 4† (1); Sept. 25* (1); Dec. 4† (1); Dec. 18† (1).
Stanly—July 10 (1); Oct. 9† (1); Nov. 20 (1).
Union—July 31* (1); Aug. 21† (2); Oct. 16 (1); Oct. 23† (1).
Moore—Aug. 14* (1); Sept. 18† (1); Dec. 11† (1).
Anson—Sept. 11* (1); Oct. 2† (1); Nov. 13† (1).
Scotland—Oct. 30† (1); Nov. 27 (1).

FOURTEENTH JUDICIAL DISRICT

FALL TERM, 1916—*Judge Justice.*

Mecklenburg—July 10* (2); Aug. 28* (1); Sept. 4† (2); Oct. 2* (1); Oct. 9† (2); Oct. 30† (2); Nov. 13* (1); Nov. 20† (2).
Gaston—Aug. 14† (1); Aug. 21* (1); Sept. 18† (2); Oct. 23* (1); Dec. 4† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Carter.*

Randolph—July 17† (2); Sept. 4* (1); Dec. 4 (2).
Iredell—July 31 (2); Oct. 23 (1).
Cabarrus—Aug. 14 (2); Oct. 30 (2).
Davie—Aug. 28 (1); Nov. 13 (1).
Rowan—Sept. 11 (1); Oct. 9† (1); Nov. 20 (2).
Montgomery—Sept. 25† (2); Oct. 16 (1).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Ferguson.*

Lincoln—July 17 (1); Oct. 16 (1); Oct. 23† (1).
Cleveland—July 24 (2); Oct. 30 (2).
Burke—Aug. 7 (2); Oct. 2† (2); Dec. 4† (2).
Caldwell—Aug. 21 (2); Nov. 13 (2).
Polk—Sept. 28 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Lane.*

Avery—July 3† (1); Oct. 16 (2).
Catawba—July 10 (2); Oct. 30 (2).
Mitchell—July 24† (2); Nov. 13 (2).
Wilkes—Aug. 7 (2); Oct. 2† (2).
Yadkin—Aug. 21 (1); Nov. 27 (1).
Watauga—Sept. 4 (2).
Alexander—Sept 18 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Shaw.*

McDowell—July 10 (2); Sept. 18 (2).
Transylvania—July 24 (2); Nov. 27 (2).
Yancey—Aug. 14† (1); Oct. 30 (2).
Rutherford—Aug. 21† (2); Oct. 16 (2).
Henderson—Oct. 2* (2); Nov. 13† (1).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Adams.*

Buncombe—July 10 (3); July 31† (3); Aug. 28† (3); Sept. 25 (3); Oct. 23† (3); Nov. 20† (4).
Madison—Aug. 21 (1); Sept. 18† (1); Oct. 16† (1); Nov. 13† (1).

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1916—*Judge Harding.*

Haywood—July 10 (2); Sept. 18 (2).
Swain—July 24 (2); Oct. 23 (2).
Cherokee—Aug. 7 (2); Nov. 6 (2).
Macon—Aug. 21 (2); Nov. 20 (2).
Graham—Sept. 4 (2); Dec. 4 (2).
Jackson—Oct. 9 (2).
Clay—Oct. 2 (1).

*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 Clark.

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

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

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

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

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

OFFICERS

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

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

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

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

LEO D. HEARTT, Deputy Clerk, Raleigh.

WESTERN DISTRICT

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

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

Statesville, third Monday in April and October.

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

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

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

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

CHARLES A. WEBB, United States Marshal, Asheville.

*Mr. Leo D. Heartt appointed clerk at the death of Mr. Blow.

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PREFACE

RULE OF PRACTICE IN SUPREME COURT UPON REHEARING OF CASES ON APPEAL

RULE No. 52

Petitions to rehear must be filed within forty days after the filing of the opinion of the Court in the case.

No communication with the Court, or any judge thereof, in regard to any such petition, will be permitted under any circumstances, but the same must be had with the Court, in writing only, to be filed with the clerk.

No oral statement, argument, or other presentation of the cause to the Court, or any judge thereof, by either party will be allowed, unless, on special request, the Court shall so order.

This rule will be strictly enforced, and parties and counsel will govern themselves accordingly. To take effect 1 July, 1916.

February 8, 1916.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1915

HALES-BRYANT LUMBER COMPANY v. D. F. BLUE AND W. H. SIKES.

(Filed 3 November, 1915.)

1. Judgments — Excusable Neglect — Findings — Evidence — Appeal and Error.

The findings of the trial judge in setting aside a judgment thereon for excusable neglect are reviewable on appeal when not supported by the evidence.

2. Same—Case Remanded.

Where the trial court has set aside a judgment for excusable neglect, finding that summons had been read to defendant, who had forgotten it because of disease; that the judgment had thereafter been obtained by default of an answer in the course and practice of the courts, and it appears that the defendant was a man of large business interests, a director in a bank, daily attending to his affairs, the case will be remanded for further findings in order that it may more definitely appear in what respect or to what extent the impaired physical condition of the defendant affected his memory, so that the Supreme Court may more intelligently pass upon the question presented.

APPEAL by plaintiff from *Allen, J.*, at May Term, 1915, of CUMBERLAND.

Rose & Rose, H. G. Connor, Jr., for plaintiff.

Oates & Herring and Averitt & Williams for defendant Sikes.

CLARK, C. J. This is an appeal by plaintiff from an order setting aside, as to W. H. Sikes, a judgment taken at April Term of Cumberland on the ground of excusable neglect. The summons was duly served on the defendant Sikes and his codefendant Blue, on 14 July, 1913. The complaint was filed in apt time; no answer was filed by either of the defendants, and the cause was placed upon the calendar for trial
(2) at April Term, 1915, and being reached in its regular order on the calendar, the plaintiff introduced proper evidence to support the allegations of the complaint. The jury found the issues submitted to them in favor of the plaintiff, and judgment was thereupon rendered accordingly. At the next term the defendant Sikes came in and moved to set aside the judgment on the ground of excusable neglect. He does not deny that the summons was served on him, but alleges that he has no recollection thereof, and he asked the court to set aside the judgment on the ground that he was not directly or indirectly connected or associated with his codefendant Blue in the sawmill business, and particularly not in the cutting of the timber sued for in this action, and averred that his failure to employ counsel to answer and defend was due to his physical condition, which has caused him to neglect to give proper attention to matters of business, which he sometimes overlooks and forgets; that he is solvent and has a full defense to said action. The defendant Sikes filed the affidavit of his codefendant Blue, that said Sikes had never at any time been interested with him in cutting the timber which was the subject-matter of the action, and the affidavit of two physicians that the defendant Sikes has been in such a condition physically that he would neglect and fail to give proper attention to business matters. The defendant Sikes tendered a bond with security in the sum of $2,500 to abide the final judgment in this action if the judgment should be set aside. The plaintiff filed the affidavit of J. W. Bryant that Sikes was interested with Blue in the transaction which was the subject-matter of this action, also the affidavits of J. Simpson Schenck and S. W. Cooper that they have had transactions with Sikes within the last two years, and that said Sikes is a director in the bank of which S. W. Cooper is president; that they have had business dealings with him; that he is a regular customer and depositor in the bank, is a man of large business interests, and is a good business man, fully capable of looking after his own affairs.

The court found that Sikes is a man in bad health and his mind so affected by disease that he does not remember important matters, and did not remember the service of the summons upon him; that his not asserting his defense in this action was due to his physical condition, which caused forgetfulness and neglect, and that he alleges meritorious defense to this action, *i. e.*, not being a partner with said Blue, and found

that his "failure to appear and defend was on account of the causes above set out, and constitute in law and in fact inadvertence and excusable neglect."

In *Calmes v. Lambert,* 153 N. C., bottom of page 252, *Hoke, J.,* for the Court, said: "We must not be understood as holding that where an adult business man of sound mind and memory hears a summons properly read to him to attend a given term of the Superior Court and answer the complaint or a judgment will be taken against him, he (3) can be relieved from such judgment on account of surprise or excusable neglect under Rev., 513, because some local officer tells him that the summons is only a subpœna to testify in some other case."

It is true that we have held that the findings of fact by the judge on such motion will not be reviewed by us when there is any evidence to support them. But, in this case, we do not think there is evidence to support the finding that the failure of the defendant Sikes was due solely to his physical condition. It is true that the judge finds that he is in bad health, and that, consequently, his memory is not good, and that he is forgetful; but if that were sufficient cause to set aside a judgment in an action in which a defendant, duly served with summons, has failed to employ counsel, or give attention to it, bad health and forgetfulness will alarmingly increase.

Looking into the affidavits, we find that the defendant Sikes is a director in two banks, and that the president of one of these testifies that he is a competent business man, attending the meetings of the bank directors, taking part in the discussions, and he further testifies, as does also the manager of the Insurance and Realty Company, that he is prompt in meeting his business appointments and in complying with the terms of his transactions, and uses good judgment in protecting his large business interests, to which he gives close personal attention, and is fully capable of looking after his own affairs. It is true that the two physicians depose that the defendant has been in such a condition physically that he would neglect to give proper attention to matters of personal importance, and that its influence on him has been "of such a nature, at times, as to cause neglect, oversight, and forgetfulness as to his business affairs," but there is no evidence in the testimony of the physicians that shows the name or nature of the disease, or that it has rendered him either *non compos mentis* or unfit to attend to business.

There has been no effort on the part of his friends and relatives to have a guardian appointed for him; indeed, the testimony on his behalf is that he is still largely immersed in the transaction of business. The mere fact that he asserts that he has a good defense cannot avail unless it is first shown that there was excusable neglect which would justify

setting aside the verdict. Even in such case the judgment would not be set aside unless a meritorious defense was shown.

Besides, in this case it appears that the judgment was not obtained until nine months after service of the summons, and that the cause had been regularly placed for trial on the calendar (which is usually published in the papers), was reached in regular course, and the evidence was submitted to the jury and a verdict duly found.

We will remand the case for a fuller and more complete finding
(4) of facts by the court below, ascertaining definitely the nature of the disease; whether it deprived the defendant of memory and capacity to attend to his legal business; whether or not he was, at the time, attending to his duties as a bank director, and to his other large business interests, and whether his failure to attend to this matter was not really due to fatigue, superinduced by attention to his large business interests, and by failure to have competent assistance, or was due to such real impairment of his mental faculties as to render him incompetent to defend this action.

The owner of a judgment properly obtained has a valid interest which should not be impaired or set aside by reason of inattention of the other party, and failure to give the litigation proper attention. The defendant had due notice, in the manner the law requires, to attend court and answer the complaint. It is not sufficient to find that, owing to business worries, and large business interests, causing physical fatigue, he was forgetful. We think there should be a fuller finding of all the facts, that this Court may intelligently pass upon the legal ruling thereon, whether the defendant's negligence was excusable or not. Mere forgetfulness, due to the defendant giving his attention to more important matters, is not a sufficient excuse.

Remanded.

Cited: Baker v. West, 190 N. C. 335 (1b); *Johnson v. Sidbury,* 225 N. C. 210 (21).

JOHN C. HOLLY v. THE LONDON ASSURANCE COMPANY.

(Filed 3 November, 1915.)

Insurance, Fire—Policy Contract—Stipulation as to Suit—Limitation of Actions—Disability—Interpretation of Statutes.

The provision in the standard form of fire insurance policy, sanctioned by statute, Revisal, section 4809, that suit thereon will not be sustained unless commenced within twelve months after the fire, is valid, and rest-

ing by contract between the parties, is not regulated by the statute of limitations, and the disabilities which stop the running of the statute, Revisal, section 362 (3), have no effect upon it. *Hence*, the imprisonment of the insured will not affect his right to recover when he has delayed his action for more than a year.

APPEAL by defendant from *Rountree, J.*, at the May Term, 1915, of NEW HANOVER.

Action brought by the plaintiff to recover of the defendant the amount of loss claimed to have been sustained on account of damage by fire to the property insured, upon a contract of insurance. The case was heard upon complaint and demurrer. From the judgment overruling the demurrer the defendant appealed.

C. D. Weeks, W. J. Bellamy for the plaintiff.

E. K. Bryan for defendant.

BROWN, J. The policy sued on is attached to the complaint (5) and is in form the regular standard policy authorized by the statutes of this State. Among other provisions, it contains the following:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire."

One of the grounds of demurrer is that it appears upon the complaint that the fire loss occurred 10 August, 1910, whereas, as appears upon the summons, this action was commenced 22 October, 1913, and therefore not within the twelve months as required by the policy. The provision of the policy is sanctioned by the statute, Rev. 4809, and has been upheld as a reasonable and valid protection to the company. *Muse v. Assurance Co.*, 108 N. C., 240; *Lowe v. Accident Assn.*, 115 N. C., 18; *Hovey v. Fidelity and Casualty Co.*, 200 Fed., 925; *Modlin v. Ins. Co.*, 151 N. C., 35; *Gerringer v. Ins. Co.*, 133 N. C., 414; *Parker v. Ins. Co.*, 143 N. C. 339.

In order to excuse the failure to commence his action within the time fixed by the policy, the plaintiff alleges that he was continuously imprisoned from 10 August, 1910, to some date (not given) in 1913 in the common jail of New Hanover County. Plaintiff claims the benefit of this disability. Rev., 32, subsec. 3.

The twelve months clause in the policy is not a statute of limitation, but a contractual limitation. *Parker v. Ins. Co., supra.* It is a valid contract entered into between the parties, and the disabilities which stop the running of a statute of limitations have no effect upon it. Such

a stipulation is binding even upon a minor, who must abide by it. *Heilig v. Ins. Co.*, 152 N. C., 358.

The demurrer should have been sustained.

Reversed.

Cited: Tatham v. Ins. Co., 181 N. C. 434 (f); *Beard v. Sovereign Lodge*, 184 N. C. 157 (f); *Brick Co. v. Gentry*, 191 N. C. 642 (g); *Rouse v. Ins. Co.*, 203 N. C. 346 (f).

MAXTON REALTY COMPANY v. J. W. CARTER ET ALS.

(Filed 3 November, 1915.)

1. **Deeds and Conveyances—Registration—Judgments—Liens—Interpretation of Statutes.**

   Where a judgment is obtained against a grantor of lands subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. Revisal, section 980.

2. **Deeds and Conveyances—Husband and Wife—Gifts—Resulting Trusts.**

   The law regards a purchase of lands by the husband, with his own money, and the conveyance thereof made to the wife, as a gift to the wife, and not as creating a resulting trust in his favor.

3. **Same—Judgment Debtor—Estoppel.**

   When the original owner of lands has sold and conveyed them to the plaintiff, and the defendant is a judgment creditor of the plaintiff's grantor, having a lien superior to the plaintiff's title, and some of these lands had been sold and conveyed by the plaintiff to the defendant's wife, but paid for by him, the fact that the defendant paid the purchase price for his wife's land creates no estoppel which would prevent his collecting his judgment out of the remaining lands owned by the plaintiff.

4. **Registration—Maps—Title—Color—Unregistered Deeds.**

   A plat or map of lands professes to pass no title to the lands platted, and does not constitute color of title thereto; and the registration of the map cannot supply the lack of the registration of the deed conveying the lands platted.

(6) APPEAL by plaintiff from *Whedbee, J.*, at the September Term, 1915, of ROBESON.

Civil action, brought to enjoin a sale under execution of certain property described in the complaint, heard upon a dumurrer *ore tenus* to the complaint upon the ground that it fails to state a cause of action. His

Honor sustained the demurrer and dismissed the action. Plaintiff appealed.

McLean, Varser & McLean for the plaintiff.

McLean & McKinnon, McIntyre, Lawrence & Proctor for the defendants.

BROWN, J. The allegations of the complaint, stated succinctly, set forth that Wilkinson and others owned a certain tract of land described in the complaint, which was sold by them to the plaintiff in 1909. The deed to the plaintiff was recorded 4 May, 1915. The plaintiff subdivided this land into lots, had a map of the premises made and recorded the map in the book of official maps in the register's office of Robeson County, and thereafter had a sale of some of these lots.

Several of the lots were purchased by Lena B. Carter, wife of the defendant, and the title was made direct from the Realty Company to her. It is alleged that the husband paid the purchase money. It is further alleged that a part of the purchase money received by Wilkinson from the plaintiff was paid to the defendant Carter by the said Wilkinsons upon a debt which they owed him.

At March Term, 1915, of Robeson Superior Court, defendant Carter obtained judgment against the said Wilkinsons, the original owners of the land, and this judgment was duly docketed prior to the date when the deed from the Wilkinsons to the plaintiff was registered. Execution was issued upon this judgment and levied upon the part of the lands now owned by the Realty Company, the plaintiff, and acquired from the Wilkinsons. In this action the plaintiff seeks to enjoin the sale of them.

It is manifest to us that the complaint sets forth no cause of action. The docketing of the judgment was prior to the registra- (7) tion of the deed, which gave the judgment a prior lien. It has been repeatedly held that a judgment taken and docketed after the delivery of the deed but prior to its registration is a superior lien upon the land. *Tarboro v. Micks,* 118 N. C., 162; *Bostic v. Young,* 116 N. C., 766; *Francis v. Herren,* 101 N. C., 497.

The registration of the map cannot supply the lack of registration of the deed. The map professes to pass no title and is not even color of title. *Williams v. Scott,* 122 N. C., 545.

The fact that Carter's wife purchased some of the lots creates no estoppel upon the part of the husband which would prevent his collecting his judgment out of the lands belonging to the plaintiff. The wife did not hold the lots which had been conveyed to her by the plaintiff in trust for her husband. The fact that the latter paid the purchase money

does not create a resulting trust in his favor. The law regards it as a gift to the wife. *Arrington v. Arrington,* 114 N. C., 116.

The rights of the parties depend solely upon the registration laws. Rev., section 980. It is solely on account of a failure to comply with this statute that the plaintiff's land may be subjected to the payment of the Carter judgment against the Wilkinsons.

Affirmed.

Cited: Eaton v. Doub, 190 N. C. 17, 20 (1f); *Boyd v. Typewriter Co.,* 19 N. C. 800 (1b).

JIM GAINEY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 3 November, 1915.)

1. Telegraphs—Free Delivery Limits—Extra Charge Paid—Negligence—Evidence—Questions for Jury.

Where a telegraph company has wired back to the sending point nad asked for extra payment for delivery beyond the free delivery limits of the terminal office, which is made by the sender at 8:30 o'clock a.m., and the message is not delivered at a distance of two and one-half miles until 10:30 o'clock of the same day, the transmission of the message by wire being local, the case should be submitted to the jury upon the question of the defendant's negligence in not sooner delivering the message.

2. Telegraphs—Principal and Agent—Declarations—Trials—Evidence Contradictory.

Where negligence is alleged in an action to recover of a telegraph company damages for not promptly transmitting and delivering a message announcing a death, testimony that the defendant's agent said, at the time, that the message was not delivered because he did not know where the sendee lived, is competent when contradictory of his evidence given at the trial.

3. Telegraphs—Measure of Damages—Hiring Conveyance—Trials—Questions for Jury.

In an action to recover damages of a telegraph company for its negligent delay in the transmission and delivery of a telegram, where the evidence in defendant's behalf tends to show that the plaintiff could have avoided the damages by hiring a conveyance for $5, and, in plaintiff's behalf, that he would have paid more than the $5, but did not have the money to hire the conveyance, the question of the amount of damages, upon the negligence of the defendant being shown, is one for the jury, and not limited to the $5 for which the conveyance could have been hired; and the charge of the court in this case, leaving it for the jury to determine whether the plaintiff could have taken the conveyance, is proper.

APPEAL by defendant from *Allen, J.*, at April Term, 1915, of (8) CUMBERLAND.

Davis & McRae for plaintiff.
Rose & Rose for defendant.

CLARK, C. J. On 31 July, 1913, at Linden N. C., B. Gainey delivered to the defendant at 7:45 p. m. a telegram addressed to Jim Gainey at Purvis, N. C., as follows: "Loula May killed by lightning this evening. Come." The sender was informed that it could not be delivered that night, as it had to be sent to Elrod, N. C., and be telephoned from there. The plaintiff lived about half a mile from Purvis and about two and one-half miles from Elrod, at which latter point the message was received at 9:19 p. m. The Elrod office sent a service message to Linden, which was received at 8 a. m. next morning, and the Linden office guaranteed special delivery charges. The message was not delivered to Gainey till 10:20 a. m. He immediately left in a run to take the 10:45 train at Elrod for Fayetteville, but failing to get there in time, he took the freight train, which put him in Fayetteville at 4:20 p. m. He spent the night there and left on the first train, reaching Linden at 8 a. m. next day, too late for the funeral.

The defendant contended that the plaintiff might have taken a private conveyance for $5 after his arrival at Fayetteville, and have gone thus to Linden, eighteen miles away. The plaintiff testified that he would have done this, but did not have the money.

Loula May was the four-year-old motherless niece of the plaintiff and had lived much of her life at his house, and there was evidence of a strong affection between them and of plaintiff's mental anguish produced by the negligence of the defendant in causing him to fail to attend the funeral.

The first assignment of error is for refusal of a motion to nonsuit. But there was evidence of negligence sufficient to go to the jury in failing to deliver the message (after receipt of the guarantee of charges for special delivery at 8:30 a. m.) before 10:20 a. m., when the plaintiff lived at a distance of only two and one-half miles.

The second assignment of error is for admitting evidence that the defendant's agent told the plaintiff, at the time, that the message guaranteeing the extra charges was received by him at 8:30 a. m., and that the reason it was not delivered was because he did not know (9) where the plaintiff lived. This was not incompetent, for it is not an admission by the agent of negligence on the part of the company, but a narrative by the agent of his own conduct, which the plaintiff could give in evidence in contradiction of Jones's own statement in evidence.

The third assignment of error is to the judge's charge that if the jury found the defendant negligent it would be liable for such suffering as the plaintiff underwent in consequence of his not being able to get to the funeral in time. But in the connection used, the court evidently meant, if it caused such failure.

The fourth assignment is that upon the second issue, "Could the plaintiff by the exercise of reasonable diligence have reached Linden in time for the funeral and burial?" the court told the jury that the burden was on the defendant. The jury having found, in response to the first issue, that the defendant "negligently delayed to transmit and deliver the telegram," the defense that, notwithstanding such negligence, the plaintiff by the exercise of reasonable diligence could have reached Linden in time for the funeral, was set up by the answer, and the court properly instructed the jury that the burden of proving such allegation was on the party that pleaded it.

The fifth assignment of error is that the court refused to charge, as prayed, that "If the plaintiff could have hired an automobile, or other conveyance, and gone to Linden in time for the funeral, then in no view of the case could the plaintiff recover more than the price of such conveyance, which under the evidence was only $5," and the defendant asks that the judgment in this Court should be modified by reducing the damages to $5.

The amount of damages is a matter peculiarly within the province of the jury, who doubtless considered it in every phase presented by the able argument of counsel for the defendant. The plaintiff testified that he would have paid the $5 (or even $25), but that he did not have the money. This case is on all-fours with *Bailey v. Tel. Co.*, 150 N. C., 316, in which the Court held: "When negligent delay is shown in the delivery of a message, and the uncontradicted evidence of the defense is that by driving a distance through the country trains could have been caught which would have enabled plaintiff to have reached his destination before the funeral, the court cannot say as a matter of law that it was plaintiff's duty to thus avoid the injury, but the question is one of fact for the jury under all the facts and circumstances of the case." The court in this case left it to the jury to find, upon the evidence, whether or not the plaintiff could, by reasonable diligence, have gone from Fayetteville by other conveyance than the railroad and have reached the funeral in time. The jury found that he could not.

No error.

(10)

NATIONAL BANK OF LUMBERTON v. G. W. LENNON ET AL.

(Filed 3 November, 1915.)

Banks and Banking—Cashier—Principal and Agent—Bills and Notes—Release of Liability—Consideration—Ultra Vires Acts.

There is no implied authority given to a cashier of a bank, by virtue of his office, to release, without consideration, one of the joint makers from his liability on a note given to the bank; and when it is shown that the cashier agreed that if one of the two makers of a partnership note paid a certain amount upon a well-secured note given by the other individually to the bank, such other maker would be released from all liability on the joint note sued on, the transaction is without consideration and the bank is not bound thereby.

APPEAL by defendant Lennon from *Allen, J.*, at March Term, 1915, of ROBESON

Johnson & Johnson and McIntyre, Lawrence & Proctor for plaintiff.
McLean, Varser & McLean and Robert E. Lee for defendants.

CLARK, C. J. This is an action against the defendants Lennon and Edens, makers, on a note for $500, and against the defendants Hinson Bros., as endorsers.

The defendants Lennon and Edens formed a partnership and purchased a livery business from Hinson Bros. for $1,500. To pay the purchase money Lennon borrowed $500 from the plaintiff on his individual note, secured by a mortgage on real estate, and paid this $500 to Hinson Bros. on the purchase money. For the other $1,000, Lennon and Edens executed to Hinson Bros. two notes for $500 each, secured by chattel mortgages upon the livery, teams and equipment purchased. When the first of these two notes became due, Lennon and Edens being unable to pay it, the plaintiff, at their request, paid Hinson Bros. the amount due upon that note, and they endorsed the note over to the plaintiff. This is the note sued on. Afterwards Lennon and Edens dissolved partnership, leaving this $500 note in the hands of plaintiff, unpaid, as well as the $500 note which had been executed to plaintiff by the defendant Lennon and which was secured by mortgage on real estate.

Upon the trial the defendant Lennon contended that plaintiff's cashier had released him from liability upon the note sued on. He testified that in July, 1910, when he and Edens dissolved partnership, said cashier agreed that if Edens would pay $300 on the $500 note which plaintiff held against defendant Lennon, which was secured by the real estate mortgage, the plaintiff would not only release Lennon from liability on

the said note, but would also release him from liability on the $500 note which the plaintiff had purchased from Hinson Bros., signed by Lennon and Edens, and the cashier further agreed that he would look to Edens alone for payment of both notes. This alleged agreement was
(11) denied by the cashier, who testified that the defendant Lennon was released from liability only on the $500 note secured by the real estate mortgage, on which note Edens paid $300, and that Lennon and Edens had a sufficient deposit with plaintiff to pay the balance on that note, but that there was no agreement to release defendant Lennon from liability on the $500 note which plaintiff had purchased from Hinson Bros., which is the note sued upon. It was conceded that at the time of the alleged agreement the $500 note secured by the real estate mortgage (on which the $300 was paid) was past due and was secured by a mortgage on real estate worth several times the amount of that note, and that Edens was then insolvent to the knowledge of both defendant Lennon and plaintiff's cashier, and is still insolvent.

At the conclusion of the testimony the plaintiff moved that the court direct the jury to find the issue for the plaintiff if they believed the defendant Lennon's testimony, for that there was no consideration for his release from liability, and, further, that the plaintiff's cashier had no power or authority to release defendant Lennon from liability on the note now in suit, he being then solvent and there being no dispute about his liability at that time or as to the amount due on the note. The court charged the jury to find the issues against the defendant Lennon, if they believed the evidence and found the facts to be as testified. In this there was no error.

There was no evidence that Lennon had been legally discharged from liability upon said note by an agreement with the plaintiff's cashier, for there was no consideration for said agreement. The other $500 note on which the $300 was to be paid was already past due and was secured by a mortgage on real estate worth several thousand dollars. There was no consideration, therefore, to release Lennon from liability on this $500 note on which Edens, who was insolvent, was the other party.

Besides, the plaintiff's cashier had no power or authority to make such agreement as herein alleged, by virtue of his office, and no express authority is shown. In *Bank v. Wilson,* 124 N. C., 564, it is said: "The alleged agreement was beyond the scope of the agency of a cashier and without consideration, and therefore void. . . . Such transactions are not within the ordinary dealings of the bank, and cannot be encouraged."

In the note to *Bank v. Moore,* 28 L. R. A. (N. S.), 501, the authorities are thus summed up: "It is a general rule, recognized by the great majority of the cases, that the president or cashier or any other similar

executive officer of the bank has no authority, simply by virtue of his office, to bind his bank by an agreement made with the maker or endorsers of commercial paper, payable to the bank, that their liability on such paper will not be enforced."

No error.

Cited: Bank v. West, 184 N. C. 223 (g); *Bank v. Clark,* 198 N. C. 172 (g); *Trust Co. v. Lewis,* 200 N. C. 289 (g); *Jones v. Bank,* 214 N. C. 799 (l).

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(12)

AUTY BALDWIN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 November, 1915)

1. Carriers of Goods—Live Stock—Bills of Lading—Damages—Written Notice—Waiver.

Stipulations in bills of lading covering shipments of live stock, requiring written notice of claim for damages to be given before the stock is removed from the possession of the carrier, are valid; but the requirement that the notice shall be in writing is waived upon proof of the carrier's knowledge of the injury; as, in this case, where the consignee called the attention of the carrier's agent at the point of destination to the damage done, when the stock in the carrier's possession was being unloaded, and paid the freight and took them away under an agreement that the matter should later be taken up between them.

2. Same—Discrimination.

The rule that the carrier's knowledge of damages done to a shipment of live stock while in its possession waives the stipulated requirement of its bill of lading, that written notice thereof be given to the carrier before taking the stock from its possession, applies alike to all carriers and persons dealing with them, and is not a discrimination against or in favor of any one.

APPEAL by defendant from *Justice, J.,* at the April Term, 1915, of COLUMBUS.

Action to recover damages for injury to a carload of live stock shipped from Atlanta, Ga., to Mount Tabor, N. C., on the line of the defendant.

There was evidence on the part of the plaintiff tending to prove that the stock was received in a damaged condition, which resulted from the negligence of the defendant, and as to the amount of the damage. The defendant relied upon the following stipulations in the bill of lading, under which the shipment was made, as a defense:

"That as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim

therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock.

"It is agreed that this contract contains the entire bargain between the shipper and the company, and that no conversation between owners and attendants of the live stock shipped hereunder and representatives of the company shall alter, vary, add to said contract, or be valid."

The plaintiff did not file a written notice of his claim, but he testified, among other things, as follows:

"I went to the agent and called his attention to the fact at this time that they were injured when I unloaded them. I notified the agent when he unloaded the freight. We went down to the stock pen. They were in a close place and I could not examine them, but I called his
(13) attention to hair being knocked off and told him they were in bad shape, and he told me to take them down to the barn and examine them, and I came back and paid the freight and feed bill and called his attention to the fact that one or two of these mules were stove up and had had but one feed, and we talked about it, and he told me to do the best I could. I paid him the freight and one feed bill, and went on till, the next day, I called on him in regard to finding about damages."

At the conclusion of the evidence the defendant moved for judgment of nonsuit because a written notice of the claim for damages had not been filed. The motion was denied and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

McRackan & Greer for plaintiff.

Davis & Davis, Schulken, Toon & Schulken, and W. A. Towns for defendant.

ALLEN, J. Stipulations in bills of lading, covering shipments of live stock, requiring written notice of the claim for damages to be given before the stock is removed from the possession of the carrier, are valid (*Selby v. R. R.*, 113 N. C., 588; *Austin v. R. R.*, 151 N. C., 137), but the requirement that the notice shall be in writing is waived upon proof of actual knowledge of the injury. *Kime v. R. R.*, 153 N. C., 398; *Kime v. R. R.*, 156 N. C., 451; *Kime v. R. R.*, 160 N. C., 464; *Wilkins v. R. R.*, 160 N. C., 58.

These decisions, the result of mature consideration, were rendered upon interstate shipments and after the enactment of the Elkins Act of 1903, which the defendant contends changes the rule, and we are not inclined to depart from them, at least until there is an authoritative

construction of the Federal Act to the contrary by the Supreme Court of the United States, which would be binding on us.

The two cases from the Circuit Court of Appeals (*Kidwell v. Oregon,* 208 Fed., 1; *Clegg v. R. R.*, 203 Fed., 971) are entitled to high consideration, emanating as they do from courts of learning and ability, but while they discuss the right to waive the stipulation, neither deals with the effect of knowledge brought home to the carrier before the removal of the stock.

The case of *R. R. v. Kirby,* 225 U. S., 155, which is also relied on by the defendant, presents an entirely different question. In that case a special contract giving an advantage to a particular shipper at the regular rate charged to all shippers was held to be a preference.

The rule permitting knowledge to supply the written notice is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others. It is a mode of proof applicable alike to all railroads and in favor of all shippers, and it (14) is enforced against a carrier who has had possession of the property with every opportunity to know the extent of the injury and its cause.

There are many well-considered cases that hold the stipulation to be void because unreasonable, and particularly when the notice is required to be given before the removal of the stock; but we have not gone this far.

The judgment of nonsuit was properly overruled.

No error.

Cited: Mewborn v. R. R., 170 N. C. 210 (1f, 2f); *Norse Exchange v. R. R.,* 171 N. C. 70, 71 (1f, 2f); *Schloss v. R. R.,* 171 N. C. 351 (1f, 2f); *Reynolds v. Express Co.,* 172 N. C. 494 (1f); *Bryan v. R. R.,* 174 N. C. 177 (1o, 2o); *Taft v. R. R.,* 174 N. C. 212 (1o, 2o); *Dixon v. Davis,* 184 N. C. 210 (1o, 2o).

R. C. BANKS AND WIFE v. R. B. LANE, SHERIFF OF CRAVEN COUNTY, GEORGE B. PATE AND MOSELEY CREEK DRAINAGE DISTRICT.

(Filed 3 November, 1915.)

1. Drainage Districts—Mortgages—Assessments—Injunction — Parties — Interpretation of Statutes.

Proceedings to form drainage districts under the statutes, chapter 442, Laws of 1909, amended by chapter 47, Laws 1911, are regarded as proceedings *in rem,* and bring benefit to the land, increasing its value and inuring to the benefit of the mortgagees and lienors thereon; and the act

does not require that mortgagees or other lien-holders shall be made parties. Hence, a mortgagee may not restrain the collection of assessments made on the landowners of a drainage district under proceedings had in accordance with the provisions of the statute. It is otherwise when the property is condemned under sec. 7, ch. 442, Laws 1909.

2. Drainage Districts — Mortgages — Notice — Interveners — Judgment— Estoppel.

Notice by publication is given in proceedings to form a drainage district under Laws 1909, secs. 5 and 15, ch. 442, as amended by the Laws of 1911, sec. 1, of the filing of the report in the office of the clerk of the Superior Court, which is open to inspection to the landowner or other person interested, and a mortgagee of lands who does not intervene and assert his rights to oppose the proceedings is bound by the final judgment.

3. Same—Title.

The mortgagee of lands within a drainage district laid off in conformity with the statutes is in no better condition in relation to assessments made on the land than the mortgagor in possession under apparent legal title, and can assert no superior rights in that respect.

4. Drainage Districts—Procedure—Judgments—Assessments — Mortgages —Collateral Attack.

The drainage acts are constitutional and the validity of a district laid off accordingly cannot be collaterally attacked: and a mortgagee of lands situate therein, being bound by the final decree, may not, in an independent action, restrain the collection of assessments made on the lands to pay bonds issued for their improvement.

5. Drainage Districts—Judgments—Benefits.

A final decree in proceedings to lay off a statutory drainage district is an adjudication that the benefits derived to the land within the district are more than the burdens assessed against it for such purpose.

6. Drainage Districts—Mortgages—Insolvent Owner—Benefits—Additional Security.

The insolvency of a mortgagor of land within a drainage district regularly established under the statutes gives the mortgagee no added right to enjoin the assessments on the land for the improvements made, for such improvements inure to the security of the mortgage debt.

7. Drainage Districts—Mortgages—Purchase Price—Parties—Ownership of Lands.

The principle that a conveyance of land executed simultaneously with a mortgage thereon for the purchase money does not pass the title does not apply to lands situate in a drainage district laid off under the statutes, so as to constitute the mortgagee the owner of the lands for the purposes of the proceedings, nor require that he should be made a party thereto.

(15) APPEAL by defendants from order of *Peebles, J.*, at chambers, 8 June, 1915, continuing a restraining order to the hearing.

Loftin, Dawson & Manning for plaintiffs.
Guion & Guion for defendants.

CLARK, C. J., This action was brought by the plaintiffs to restrain the collection by the sheriff of Craven of an assessment levied on the land of George B. Pate to pay the bonds and interest issued for the construction of the "Moseley Creek Drainage District" in Craven and Lenoir counties, in which the land levied on is situate.

The drainage district was constituted in accordance with chapter 442, Laws 1909, as amended by chapter 67, Laws 1911. The proceedings were regular in all respects. The plaintiffs ask to restrain the collection of the assessment upon the ground that the *feme* plaintiff is a mortgagee of the land owned by George B. Pate, and was not made a party to the proceedings by which this drainage district was created. The statute does not require that mortgagees or other lien-holders shall be made parties. In *Drainage Comrs. v. Farm Association,* 165 N. C., 701, this point was presented, and it was held that a mortgage is "subject to the authority to form these drainage districts for the betterment of the lands embraced therein. The statute is based upon the idea that such drainage districts will enhance the value of the land embraced therein to a greater extent than the burden incurred by the issuing of the bonds, and the mortgagee accepted the mortgage, knowing that this was the declared public policy of the State." In that case the mortgage had been given prior to the formation of the district. It is no more necessary that mortgagees and other lien-holders should be consulted in the formation of such districts than to permit a mortgagee or lien-holder in the absence of statutory provision to enjoin an assessment for the pavement of sidewalks or streets or other assessment on property for improvements. It is otherwise when private property is condemned to public use, as under section 7 of the Drainage Act, chapter 442, Laws 1909. The State has adopted as its public policy the encouragement of these drainage districts to improve the health and increase the fertility of (16) the sections where better drainage is needed. The proceeding is in the nature of a proceeding *in rem,* and the final judgment therein raises the presumption that the lands embraced in such district will be benefited in value. When "a majority of the resident landowners in a proposed drainage district or the owners of three-fifths of all the land affected" have signed the petition for the proposed drainage district (Laws 1909, ch. 442, sec. 2), the proceeding is instituted and all other landowners in the district are notified. The act then prescribes the method of procedure, in which the interests of all parties are duly safeguarded. To require all lien-holders or mortgagees to be made parties would give the tracts of land thereby affected a double or even greater

vote, and would probably defeat these betterments, as they are not usually interested in improving the value of the mortgaged property.

Laws 1909, ch. 442, sec. 37, provides: "The provisions of this act shall be liberally construed to promote the leveling, ditching, drainage and reclamation of wet and overflowed lands. The collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defects in the proceedings occurring prior to the order of the court confirming the final report of the viewers; but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law, unless they were appealed from." *Comrs. v. Engineering Co.*, 165 N. C., 37.

The act requires that before the confirmation of any final report there shall be a publication of the notice for hearing for twenty days in a newspaper and by posting a written or printed notice on the door of the courthouse and in five conspicuous places throughout the district, during which time the report shall be on file in the office of the clerk of the Superior Court, and shall be open to the inspection of any landowner or other person interested within the district. Sections 5 and 15, ch. 442, Laws 1909. Further legislation to that effect is enacted, Laws 1911, ch. 67, sec. 1.

The defendant George B. Pate was in possession of the land under conveyance from the *feme* plaintiff, and was duly served with summons and acquiesced in all the proceedings taken in said cause, or at least is bound by them. By virtue of the notice required by above acts the *feme* plaintiff had opportunity to intervene and assert any right she might have to oppose the proceeding, if deemed contrary to her interest. Laws 1911, ch. 67, sec. 1. Not having done so, she is bound by the judgment under which the bonds were issued for this improvement.

The procedure for the establishment of "drainage districts," the public policy and the constitutionality of the system have been often considered and upheld. *Shelton v. White*, 163 N. C., 92, and numerous cases there cited; *In re Drainage District*, 162 N. C., 127.

(17) Even if the owner in possession of this land, George B. Pate, had opposed the final decree or, indeed, opposed the formation of this drainage district, his land therein is chargeable with payment of the assessment thereon, and his mortgagee, the *feme* plaintiff, is in no stronger condition and cannot stay the collection.

It would interfere with a much-needed public development if, as a prerequisite thereto, and before a final order can be made all defects of title and mortgages or liens that may be claimed must be looked up and adjudicated. It is sufficient that summons shall be served upon the parties in possession under an apparent legal title, and that before final adjudication notice shall be given in the manner prescribed by said act

in order that parties claiming liens by mortgage or otherwise, or title to the land adversely to those in possession, shall have opportunity to come in and oppose confirmation of the final report.

The drainage act is constitutional and the validity of a district laid off under it cannot be attacked collaterally. *Newby v. Drainage District,* 163 N. C., 24.

In this case, the district has been regularly established. There is an adjudication that the required notices have been given. The bonds have been issued and the bondholders have a right to have the assessments collected to pay the interest and principal of the same. The plaintiffs not having established their claim by coming forward at the proper time to show that their interest would be adversely affected, are bound by the proceedings and cannot restrain the collection of the assessments to pay the bonds issued for the improvement of the land. The presumption is, and the final decree has adjudged in this case, that the land has been benefited by the drainage district more than the burdens assessed against it for such purpose.

The plaintiffs urge that Pate is insolvent, but this is not material, as the liability is on the land, which has been benefited by the proceedings.

The plaintiffs further insist upon the familiar principle that, as the mortgage is for the purchase money, executed simultaneously with the deed to Pate, the title did not vest in him. That is true for the purpose of preventing the vesting of dower right in his widow or the lien of a docketed judgment. But it has no application here. Pate has a conveyance of the land and is in possession of the same, and the property is liable for taxes or legally adjudged assessments in his hands.

Under the statute he was the proper party to represent such land in the formation of the drainage district, and it is bound for a pro rata payment of the bonds issued and the interest thereon, just as it is for taxes thereon.

The restraining order should have been dissolved.

Reversed.

Cited: Banks v. Lane, 171 N. C. 505 (Petition to rehear denied); *Leary v. Comrs.,* 172 N. C. 274 (4f); *Lumber Co. v. Comrs.,* 173 N. C. 119 (1l, 2l, 4l); *Lumber Co. v. Comrs.,* 173 N. C. 121 (j); *Comrs. v. Spencer,* 174 N. C. 38 (p); *Taylor v. Comrs.,* 176 N. C. 219, 225 (Same case on motion in the original cause. p); *Pate v. Banks,* 178 N. C. 140, 141 (2f); *Farms Co. v. Comrs.,* 178 N. C. 667, 668 (1f, 2f); *Caviness v. Hunt,* 180 N. C. 386 (4f); *O'Neal v. Mann,* 193 N. C. 158 (4f); *Drainage District v. Cahoon,* 193 N. C. 330 (p); *Spence v. Granger,* 207 N. C. 21 (1l, 2l); *Newton v. Chason,* 225 N. C. 207 (4f).

(18)

G. FRANK COOLEY ET AL. v. XURE LEE AND MILDRED COOLEY.

(Filed 3 November, 1915.)

1. Wills—Estates for Life—Heirs of Living Persons—Children—Remaindermen—Interpretation of Statutes.

A devise of lands to the widow of the testator for life, then to the heirs of his son J., and it appears that the son was living at the time and had living children at the death of the testator and one born thereafter, during the continuance of the life estate: *Held*, the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it will include all who are members of the class and fill the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, takes his share with the other children of J. Revisal, sec. 1583.

2. Deeds and Conveyances—Estates in Remainder—Estoppel—Rebutter.

Where the devisee of an interest in remainder in lands has conveyed such interest to the life tenant, who conveys the same to another, this interest inures to the benefit of the grantee of the life tenant and passes to him by way of estoppel or rebutter.

3. Wills—Probate—Effectiveness—Date of Death of Testator—Heirs at Law—Deeds and Conveyances—Equitable Limitations of Actions—Statutes.

While it is provided by our statute, Revisal, sec. 3139, that a will shall not be effective to pass real or personal estate "unless it shall have been duly proved and allowed in the probate court of the proper county" and recorded in clerk's office, etc., there is no statute of limitations as to when a will may be admitted to probate, our registration act, Revisal, sec. 980, not being applicable; and the probate, when proved, allowed and recorded, as the statute requires, becomes effective and relates back to the death of the devisor, passing the title from that date, avoiding all disposition or conveyances of the property by the heirs contrary to the provisions of the will, unless the claimants are protected by the statute of limitations or some recognized equitable principle. Chapter 219, Laws of 1915, amending Revisal, sec. 3139, regarding the rights of innocent purchasers for value, etc., is inapplicable to this case.

4. Wills—Life Estates—Remaindermen—Possession—Deeds and Conveyances—Limitation of Actions.

Where the tenant for life conveys his interest in the lands devised to him, and the grantee also holds under a deed from one of several remaindermen and is in possession of the lands, such occupation is not wrongful or hostile to the title of the other remaindermen until the life estate has fallen in, and the statute of limitations will not begin to run against their title until then.

5. Estates—Remaindermen—Deeds and Conveyances—Tenants in Common —Limitation of Actions.

Where a tenant for life in land, and one of several remaindermen, has conveyed the *locus in quo* to a stranger, *semble*, this grantee and the other remaindermen are tenants in common, requiring twenty years adverse, etc., possession of such grantee after death of life tenant to ripen the title in himself.

6. Limitation of Actions—Disability—Interpretation of Statutes.

A person by reason of the disability mentioned in Revisal, sec. 362, does not lose his right to maintain his action within the time generally limited to the subject-matter thereof, but he may do so within three years from the removal of the disability, though it may extend the time generally limited to actions of that character.

APPEAL by defendant from *Daniels, J.*, at the October Term, (19) 1914, of SAMPSON.

Civil action to recover land, heard on denial of plaintiffs' title. The pertinent facts set forth in the case agreed are very succinctly stated in his Honor's judgment, as follows:

"This cause coming on to be heard upon the agreed statement of facts signed by counsel for plaintiffs and defendants, and being heard, and it appearing therefrom that G. M. Cooley died in 1894, domiciled in the county of Nash, leaving a last will and testament, whereby he bequeathed and devised all his property, real and personal, to his wife, Mary J. Cooley, for the term of her natural life, and thereafter one-half thereof to James F. Cooley's heirs, and the other one-half thereof to Roger A. P. Cooley and his heirs; that the said J. F. Cooley was married at the time of the death of his father, G. M. Cooley, and that G. Frank Cooley, Wallace D. Cooley and all the plaintiffs except Mary Lillian Cooley, had been born of said marriage and were living at the time of the death of the said G. M. Cooley, the said Mary Lillian Cooley having been born of the said marriage 23 September, 1895; and it further appearing therefrom that, on 4 March, 1897, the said James F. Cooley and his wife, Carrie Cooley, Roger A. P. Cooley and his wife, Hattie Cooley, and Mary J. Cooley, widow of the said G. M. Cooley, executed and delivered to Jesse Lee, the grantor of the defendant, Xure Lee, a deed purporting to convey in fee simple to the said Jesse Lee the land in controversy, being a portion of the lands devised in said will, with full covenants of warranty and seizin, which deed was duly registered in the office of the register of deeds of Sampson County, 17 November, 1897; and that thereafter the said Jesse Lee executed and delivered deeds purporting to convey said lands in fee simple to the defendant Xure Lee, dated 16 November, 1897, and 27 October, 1898, respectively, the first registered in said office 17 November, 1897,

and the other 27 October, 1908; and it further appearing therefrom that the defendant Xure Lee purchased said lands in good faith, went immediately into the possession thereof, has since held the open and exclusive possession thereof under known and visible boundaries, and has made valuable improvements upon a portion thereof; that thereafter, on 20 July, 1899, the said will of G. M. Cooley was duly proven and recorded in the office of the clerk of the Superior Court of Nash County, and thereafter, on 10 July, 1910, a duly certified copy of said will and its probate was duly recorded in the office of the clerk of the court of Sampson County; and it further appearing therefrom that W. D. Cooley, one of the children of James F. Cooley, on 1 July, 1906, conveyed all his interest in said lands under the said will to the defendant Mildred Cooley; that another of said children, Roger D. Cooley, on 10 July, 1906, conveyed all of his interest under said will to Mary
(20) J. Cooley, the widow of said G. M. Cooley, and that G. Frank Cooley, another of said children, has died since the beginning of this action, intestate and without issue, leaving a widow surviving him; and it further appearing to the court that Mary J. Cooley, the widow of G. M. Cooley, and the life tenant of said land, died 4 September, 1908; and it further appearing that this action, in so far as it affects the defendant Xure Lee, was begun at May Term, 1914, of this court; and that thereupon the court being of the opinion that the statute of limitations did not begin to run against the plaintiffs and the said Mildred Cooley and in favor of the defendant Xure Lee until the death of the said Mary J. Cooley, the life tenant, 4 September, 1908, and that there was no adverse possession by the defendant Xure Lee of the said lands against the plaintiffs and the said Mildred Cooley until that date, adjudges that the cause of action of the plaintiffs and the said Mildred Cooley is not barred by the statute of limitations; and it is further considered and adjudged by the court that the plaintiffs are the owners, and that they recover of the defendant Xure Lee an undivided five-fourteenths interest in and to said land, and that the said Mildred Cooley is the owner, and that she recover of the defendant Xure Lee an undivided one-fourteenth interest in and to said lands. It is further considered and adjudged by the court that the defendant Xure Lee is the owner in fee simple of an undivided eight-fourteenths interest in and to said lands. It is further considered and adjudged that the plaintiffs, other than Gladys H. Cooley and Mary J. Cooley, and the defendant Mildred Cooley, recover of the defendant Xure Lee their proportionate parts of the rents of said lands for three years next preceding May Term, 1914, of this court, and that the plaintiffs Gladys Cooley and Mary Lillian Cooley recover of the defendant Xure Lee their proportionate parts of the rents of said lands from the death of Mary J. Cooley, 4 September, 1908."

From this judgment defendant excepts and appeals, assigning errors as follows:

1. For that his Honor held that the plaintiffs were entitled to any part of the lands in controversy, under the will of Dr. G. M. Cooley, deceased; whereas, he should have held that said will was ineffectual to pass any title to the plaintiffs or to the defendant Mildred Cooley as against the defendant Xure Lee.

2. For that his Honor held that the plaintiffs and the defendant Mildred Cooley's causes of action were not barred by the statute of limitations.

3. For that his Honor held that the statute of limitations did not begin to run against the plaintiffs and the defendant Mildred Cooley's cause of action until the death of Mary J. Cooley, widow of Dr. G. M. Cooley, deceased; whereas, he should have held that the statute of limitations began to run as to each of the plaintiffs, and the defend- (21) ant Mildred Cooley, on 4 March, 1897, the date upon which the deed from R. A. P. Cooley and others to Jesse Lee was executed.

4. For that his Honor held that Mary Lillian Cooley was entitled to a one-fourteenth undivided interest in the lands in controversy; whereas, by virtue of the fact that she was born after the death of the said G. M. Cooley, testator, his Honor should have held that she could take nothing by virtue of said will.

5. For that his Honor held that the plaintiffs, and the defendant Mildred Cooley, were entitled to any part of the rents and profits issuing from said lands.

Stevens & Beasley for plaintiff.

Grady & Graham for defendant.

HOKE, J. On the facts embodied in the judgment we concur with his Honor that plaintiffs are entitled to five-fourteenths and defendant Mildred to one-fourteenth of the property in controversy.

It is admitted that the title was in G. M. Cooley and that he died in 1894, having made his last will and testament devising the property in controversy to his widow, Mary J. Cooley, for life, and then "one-half to his son, R. A. P. Cooley and his heirs and the other half to the heirs of James F. Cooley, his other son"; that James F. Cooley was living at the time of the death of the devisor and still is, and plaintiffs are his children, six of whom were born at the time of devisor's death and one after such death and during the life of devisor's wife, life tenant under the will.

Under our statute, Revisal, sec. 1583, this devise of the one-half interest, subject to a life estate in the widow, being to the heirs of a

living person, conveys such interest to the children of the person designated, and being in terms, to a class, under various decisions in our State it will include all who are members of the class and fill the description at the time the particular estate terminates. *Graves v. Barrett,* 126 N. C., 267; *Irvin v. Clark,* 98 N. C., 437; *Hawkins v. Everett, Exr.,* 58 N. C., 42; *Simpson v. Spence,* 58 N. C., 208; *Knight v. Knight,* 56 N. C., 168.

In *Wise v. Leonhardt,* 128 N. C., 289, in which the after-born children were excluded, the decision was made to rest on the ground that, in order to an application of the principle to devises of realty, there must be an intervening estate for life or years between the death of the testator and the coming into the possession of the estate in remainder.

This, then, being the recognized principle, the seven children of J. F. Cooley, both those born before and the one born after the death
(22) of the devisor and prior to the death of the life tenant, according to the terms of the will, became the owners of the one-half of the property, equal to seven-fourteenths, subject to the life estate in their grandmother, and they have done nothing to destroy or impair these interests save in the case of W. D. Cooley, who, on 1 July, 1906, conveyed his share to defendant Mildred, which share was allowed her under his Honor's judgment, and of Roger D. Cooley who, on 10 July, 1906, conveyed all of his title and interest to his grandmother, Mary J. Cooley. She having theretofore joined in a deed for the property to defendants, conveying same with full covenants, this conveyance to her by Roger D. of his one-fourteenth interest should inure to the benefit of her grantee and pass this interest to him by way of "estoppel or rebuttal," *Buchanan v. Harrington,* 141 N. C., p. 39; *Hallyburton v. Slagle,* 132 N. C., p. 947; *Taylor v. Shufford,* 11 N. C., p. 127; the result being, as declared in the judgment, that plaintiffs who have not disposed of their interests hold five-fourteenths, Mildred holds one-fourteenth, and defendants, who bought from the widow and two sons and heirs at law of G. M. Cooley, to wit, R. A. P. and James F. Cooley, prior to the probate and registration of the will, are entitled to eight-fourteenths, that is, seven-fourteenths under the deed from R. A. P. Cooley and one-fourteenth by way of rebutter, as heretofore indicated.

It is urged against the correctness of his Honor's judgment that the deed of the widow of G. M. Cooley and his two sons and heirs at law, R. A. P. and J. F. Cooley, executed in March, 1897, at least three years after the death of G. M. Cooley, devisor and former owner, should be held to pass the title as against the devisees, and this chiefly by reason of section 3139 of Revisal, providing, among other things, that "No will shall be effective to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county,

recorded in the office of the clerk of the Superior Court of the county where the land lies," etc.; that the will in question here was not proven until 1899 and not recorded in Sampson County till 1910. It is true that the will is not effective to pass the property until proved and allowed and recorded as the statute requires, but there is no statute of limitations as to the time when a will may be admitted to probate, *Steadman v. Steadman,* 143 N. C., p. 345; and it is held that our ordinary registration act, Revisal, sec. 980, has no application to wills, *Harris v. Lumber Co.,* 147 N. C., p. 631; *Bell v. Couch,* 132 N. C. p. 346; and when the formalities as to proof and recording of a will have been complied with, it then becomes effective and relates back to the death of the devisor, passing the title from that date and, at the time when the rights of these plaintiffs vested, avoiding all dispositions or conveyances of the property by the heirs contrary to the provisions of the will, unless the interests of the claimants are protected by the statute of limitations or some recognized equitable principle. *Steadman v. Steadman, supra;* (23) *Johns v. Jackson,* 67 Conn., p. 89; *Barnard v. Bateman,* 76 Mo., 414; *Goodman v. Winter,* 64 Ala., 410; *Tonart v. Rickert,* 163 Ala., 362 *Bleidorn v. Pilot Mtn. Co.,* 89 Tenn., pp 166-173; *Wilkinson v. Leland,* 27 U. S. (3 Peters), 629; 1 Underhill on Wills, p. 21; Gardner on Wills, p. 614.

It is well to note that the Legislature of 1915, chapter 219, have enacted a statute to appear as a proviso to section 3169 of the Revisal, as follows: "*Provided,* that the probate and registration of any last will and testament shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the said last will and testament has been fraudulently withheld from probate," a similar statute to that which has long prevailed in case of intestacy. Revisal, sec. 70. But the statute does not, and does not purport to, apply to the facts presented in this record. It is further insisted that defendants' title has matured by reason of adverse occupation of the property in the assertion of ownership under the deed of the widow and two sons of the devisor since 1897, the date of that conveyance; but this position cannot be sustained as to any of the plaintiffs by reason of the existence of the life estate conferred by the will on Mary J. Cooley, wife of devisor and one of the grantors in the deed under which defendants claim. Her deed, while it did not convey the title to the property, did convey what she had—a life estate devised to her under the will—and the occupation of defendant, therefore, did not become wrongful until the death of this life tenant, nor would the statute run except from that date.

A title by possession does not mature unless that possession has been hostile for the requisite period and subjecting the occupant to action by the true owner for that length of time. If, then, plaintiffs had sued defendant before the life tenant died, their action would have failed because of the life estate conveyed to him under his deed, and so his occupation was not wrongful or hostile to the true title till the life estate terminated, nor did the statute begin to run before that date. *Jefferson v. Lumber Co.,* 165 N. C., p. 46; *Smith v. Proctor,* 139 N. C., p. 314; *Everett v. Newton,* 118 N. C., 919.

The life tenant did not die till September, 1908, and seven years had not elapsed before the institution of this suit against defendant, and so none of plaintiffs are barred.

It would seem that as the deed of R. A. P. Cooley and Mary J. Cooley conveyed to defendant eight-fourteenths of the property, constituting him a tenant in common with plaintiffs, adverse occupation for twenty years would be required to defeat plaintiffs' claims. *Dobbins v.* (24) *Dobbins,* 141 N. C., p. 210. Again, it is contended that some of the claimants are barred because more than three years had elapsed since their cause of action accrued on the death of the life tenant, and this by reason of section 362 of the Revisal, in reference to disabilities under the statute of limitations and their removal. That section provides that, when a person, at the time of his cause of action accrues, is within twenty-one years of age, insane or imprisoned, etc., he shall have the general time specified in the statute within which to bring his action after the disability shall have been removed, except that, in an action to recover real property, etc., he shall commence his action within three years after the removal. It was by no means the purpose or effect of this section to bar the right of an infant or insane or imprisoned person by any period short of the general time specified and required in the case of adults. They are to have the full time allowed by the statute within which to assert their rights, but the provision by correct interpretation means that the statute of limitations continues to run in case of infancy, etc., but that, although seven years or other specified period may have elapsed, such person shall always have as much as three years after disability removed within which to sue. *Clayton v. Rose,* 87 N. C., p. 107; 25 Cyc., p. 1262.

In this last citation it is said: "The general rule is that the various statutes of limitations do not operate as a bar to an action by a minor for the recovery of realty; some of the statutes holding that his cause of action only accrues upon his attaining his majority, while in other jurisdictions it is held that the operation of the statute is not suspended during infancy, but the minor is merely given a designated period after attaining his majority to bring suit, if the period of limi-

tation has expired"—North Carolina being in the latter class. As we have heretofore shown, not more than six years have elapsed from the death of the life tenant before this suit instituted. Their cause of action did not accrue to them till that date, and none of plaintiffs, therefore, are barred by any statute applicable to their claims.

There is no error, and the judgment of his Honor is

Affirmed.

Cited: Olds v. Cedar Works, 173 N. C. 165 (2f); *Fulton v. Waddell,* 191 N. C. 689 (1f); *Crews v. Crews,* 192 N. C. 686 (5f); *Bell v. Gillam,* 200 N. C. 414 (1f); *Moseley v. Knott,* 212 N. C. 652, 653 (1f); *Rigsbee v. Rigsbee,* 215 N. C. 761 (1f); *Perry v. Bassenger,* 219 N. C. 847 (5d).

W. C. CROTTS v. CITY OF WINSTON-SALEM.

(Filed 3 November, 1915.)

1. Municipal Corporations—Streets and Sidewalks—Discretionary Powers.

Streets are public highways in cities for travel by the public, and adjacent owners have no more rights in them than the public generally, except the right of ingress, egress, light and air and lateral support, it being within the discretionary power of the proper municipal authority to determine where and how the streets shall be improved, what part is required for travel of vehicles, and what part, if any, shall be divided off as a pavement for the sole use of pedestrians; and the courts can interfere with the exercise of this discretion only in case of fraud and oppression, constituting manifest abuse thereof.

2. Same—Pedestrians—Adjoining Owner—Rights of Owner—Damages.

The owner of a city lot surrounded by three streets and formed by them into a triangle sixty by sixty-seven and sixty-eight feet, brings action against the city for a *mandamus* to provide sidewalks around his lot, sidewalks across the street therefrom having been made by the city authorities. The municipal authorities had deliberated upon the matter and concluded that the public necessity and convenience did not require the sidewalks contended for by plaintiff, and that such would make the streets too narrow and cause congestion of traffic therein; that the sidewalks across the street were sufficient, and to use those proposed, pedestrians would have to cross over the street for the purpose. *Held,* the exercise of the discretionary authority of the municipal authorities in refusing to establish the sidewalks contended for, is not reviewable by the courts, and no damages are recoverable in the action.

3. Appeal and Error—Pleadings—Trials—Nonsuit.

Where the complaint states no cause of action, a judgment of nonsuit may be entered in the Supreme Court.

(25) APPEAL by defendant from *Cline, J.*, at September Term, 1915, of FORSYTH.

The plaintiff brings this action to recover from the city of Winston-Salem damages for the failure of the city to provide sidewalks around a triangular lot owned by him where West End Boulevard debouches into Summit Street.

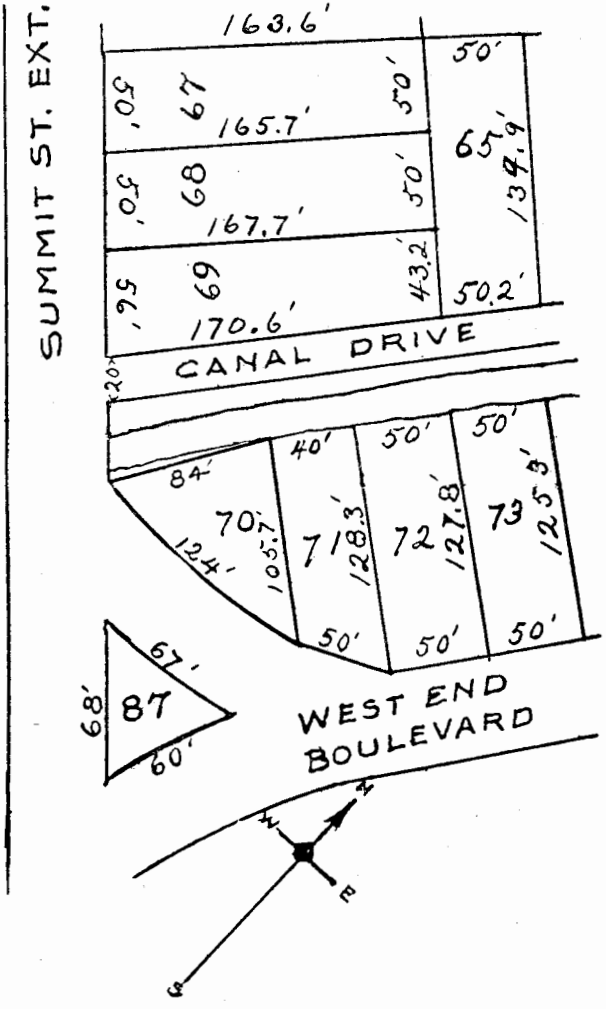
The plaintiff purchased the lot marked No. 87 from H. D. Shutt and others as shown on the plat of the property subdivided by them and sold as the "Summit Street Extension." The lot is a small triangle, being 60 feet on one side, 67 on another and 68 feet on the other side. At the time the plaintiff bought lot No. 87, it was surrounded by the Bethania Road on the west, by West End Boulevard on the east and southeast, and by Summit Street Extension on the north. Since the purchase of the lot by plaintiff, P. H. Hanes has donated sufficient land on the west to widen the Bethania Road into a street of about 55 feet in width. But the donation was made on the condition that no part of it should be used for a sidewalk adjacent to the Crotts lot. West End Boulevard is an old established street, opened in 1890, and the street to the north of lot No. 87, now known as Summit Street Extension, was opened prior to the time that the lot was purchased by plaintiff.

L. M. Swink for plaintiff.

Manly, Hendren & Womble for defendant.

CLARK, C. J. The plaintiff owns the small triangular lot No. 87, surrounded on all sides by the three streets. In the fall of 1914 the
(26) county, under the direction of the city, paved those streets with Belgian block without setting off any sidewalks around said triangular lot, which was 60 feet on one side, by 67 feet on another, and 68 feet on the other. The plaintiff desired that the city should set aside a part of the street around this triangular lot for sidewalks. The aldermen, however, finally decided, after full consideration at several meetings that the public necessity and convenience did not require sidewalks at that point, and that the whole roadway around that lot was required for the street, to prevent congestion, as there is only 50 feet from the edge of the sidewalk on the opposite side up to the plaintiff's property
(27) line and if sidewalks were placed around said triangular lot, which was an "island," so to speak, surrounded by three streets, it would unnecessarily narrow the streets. The plaintiff neither claimed nor showed any ownership in the land where he wished the city to lay out sidewalks around his property. No pedestrian could use the sidewalk if laid out around plaintiff's lot without crossing the street for that pur-

pose alone. The plaintiff frankly said that he wished the sidewalks laid out by the city that he might have an opportunity to display his goods for sale thereon. If the city were to take from the body of the streets eight feet (the usual width of sidewalks in the vicinity) for sidewalks



around plaintiff's lot, this would practically be a donation by the city almost solely for the plaintiff's benefit of an area of the public streets nearly equal to the entire area of the plaintiff's lot. This would be very advantageous for the plaintiff, but in the judgment of the alder-

men, charged with the duty of laying out streets and sidewalks it was not for the public benefit, and in their discretion it was refused.

Streets are public highways in cities for travel by the public, and adjacent property owners have no more rights in them than the public generally, except the right of ingress, egress, light and air and lateral support. The control of the streets is in the governing authority of the city, who can decide when and how the streets shall be improved, what part is required for travel of vehicles and what part, if any, shall be divided off as a pavement for the use of pedestrians solely. Courts can interfere only in case of fraud and oppression constituting manifest abuse of discretion. *Tate v. Greensboro,* 114 N. C., 392; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Wood v. Land Co.,* 165 N. C., 367.

In *Rosenthal v. Goldsboro, supra,* the Court said: "As against the landowner the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends to the entire width, and whether it will so open and improve it, or whether it should be opened and improved, is a matter of discretion to be determined by the public authorities to whom the charge and control of the public interests in and over such easements, are committed. . . . The public has a dominant interest, and the public authorities are the exclusive judges of when and to what extent the streets shall be improved. Courts can interfere only in cases of fraud and oppression constituting manifest abuse of discretion. . . . It may now be considered as established with us that our courts will always be most reluctant to interfere with the municipal governments in the exercise of discretionary powers conferred upon them for the public weal, and will never do so unless their action shall be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion."

(28) In *Hester v. Traction Co.,* 138 N. C., 293, it is said: "A sidewalk is simply a part of a street which the town authorities have set apart for the use of pedestrians. The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are that simply the street, including roadway and sidewalk, should not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purpose. An abutting owner of a street and sidewalk has an easement in his frontage which he may use in subordination to the superior rights of the public. Sidewalks are of modern origin. Anciently they were unknown, as they still are in eastern countries, and perhaps in a majority of the towns and villages of Europe. In the absence of statutes a town is not required to construct a sidewalk. It is for the town to prescribe the width of the

sidewalk. In the absence of statutory restriction, it may widen, narrow, or even remove, a sidewalk already established."

Upon the evidence, the court below should have directed a nonsuit, but as the complaint states no cause of action, let it be entered here.

Action dismissed.

Cited: Lee v. Waynesville, 184 N. C. 568 (1f); *Durham v. R. R.,* 185 N. C. 244 (1f); *Parks v. Comrs.,* 186 N. C. 498 (1g); *Ham v. Durham,* 205 N. C. 108 (1f, 3f); *Mullen v. Louisburg,* 225 N. C. 60 (1p).

IN RE WILL OF ALBERT MUELLER.

(Filed 3 November, 1915.)

1. Wills—Caveat—Undue Influence.

The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not have otherwise made, or a substitution of the mind of the person exercising the influence for the mind of the testator.

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

In an action to set aside a will for undue influence, evidence thereof is sufficient to be submitted to the jury which tends to show that the testator made the will when at the home of his sister-in-law, when old and in a dying condition of cancer of the liver, giving all of his property to his sister-in-law and her husband, making the latter sole executor, disinheriting his children and revoking a former will made in favor of his children; that the will was made several days before the testator's death and shortly after he came to the home of the beneficiaries thereunder, one of them sending for and paying the attorney who wrote the will, the attorney testifying that the testator directed him to make the will in accordance with the desires of the beneficiaries named therein who were present at the time; the children of the testator being absent; that there was no evidence that the relationship between the testator and his children was not friendly.

3. Evidence—Deceased Persons—Interpretation of Statutes—Appeal and Error.

Objection to testimony under the provisions of Revisal, sec. 1631, as to the communications or personal transactions with a deceased person, cannot be sustained when it appears on appeal that they were not of the prohibited character, that they were in favor of the appellant, and tended to sustain his contention.

APPEAL by propounders from *Justice, J.,* at the April Term, (29) 1915, of COLUMBUS.

Proceeding to caveat the will of Albert Mueller, Sr.

The caveators admitted that the alleged testator had sufficient mental capacity to make a will, but alleged that the execution of the will was procured by undue influence.

The will was signed 14 December, 1913, and Albert Mueller died 21 December, 1913, of cancer of the liver. Three weeks before his death he was moved to the home of Henry Breternitz, where he remained until his death. Henry Breternitz and his wife, Camilla, were not related to him by blood, but Camilla is the sister of his deceased wife. The said Albert Mueller left children surviving him. After being at the home of Breternitz two weeks, the paper-writing was executed giving all of his estate to Henry Breternitz and his wife and leaving Henry Breternitz as his sole executor. The paper-writing devised to Breternitz and his wife a tract of land valued at $2,000 and other real and personal property. It was written by an attorney whose services were paid for by Mrs. Breternitz, and Mr. Breternitz went after the attorney and engaged his services. Albert Mueller did not know the attorney. When the attorney reached the home of Mr. Breternitz he found Mr. Mueller in bed very sick and unable to get up. There was evidence of other circumstances which will be adverted to in the opinion.

The formal execution of the paper-writing was proven, and the propounders requested his Honor to instruct the jury that there was no evidence of undue influence, which was refused, and the propounders excepted. There was a verdict and judgment in favor of the caveators and the propounders appealed.

Schulken, Toon & Schulken for propounders.

MacRackan & Greer and Winston & Biggs for caveators.

ALLEN, J. The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made. It is the substitution of the mind of the person exercising the influence for the mind of the testator. *Wright v. Howe,* 52 N. C., 412; *In re Abee,* 146 N. C., 274.

As said in *In re Everett's Will,* 153 N. C., 85: "Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inferences from circumstances must determine it." It is "generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence." It is "said to be that degree of importunity which deprives a testator of his free agency, which is such as he
(30) is too weak to resist, and will render the instrument not his free

and unconstrained act. It is closely allied to actual fraud; and, like the latter, when resorted to by an adroit and crafty person, its presence often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, and the more helpless and secluded the victim, the less plainly defined are the badges which usually denote it. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be looked for, the situation of the party taking benefits under the will towards the one who has executed it, and their antecedent relations to each other, together with all the surrounding circumstances, and the inferences legitimately deducible from them, furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud or undue influence has been resorted to and successfully employed. *Grove v. Spiker,* 72 Md., 300." 18 A. and E. Anno. Cases, 412.

It is generally recognized that the following circumstances are evidence of undue influence in the execution of a will, and that when combined they are sufficient to support a verdict against the will, and in some jurisdictions several of them, considered separately, are said to raise a presumption of fraud and undue influence:

1. Old age and physical and mental weakness.
2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
3. That others have little or no opportunity to see him.
4. That the will is different from and revokes a prior will.
5. That it is made in favor of one with whom there are no ties of blood.
6. That it disinherits the natural objects of his bounty.
7. That the beneficiary has procured its execution.

The authorities supporting the admissibility of these circumstances on the issue of undue influence are collected and approved and their legal effect discussed in the valuable opinion of *Associate Justice Brown* in the *Everett Will case,* 153 N. C., 85, and *In re Worth's Will,* 129 N. C., 223, and in the text and notes of 40 Cyc., 1154 *et seq.* The evidence introduced by the caveators shows the presence of all these circumstances, and, in addition, there are declarations of the testator sustaining their position.

The evidence tends to prove that the testator was old and in a dying condition of cancer of the liver; that the will was executed seven days before his death; that it disposed of land worth $2,000 and of other real and personal property; that Breternitz and his wife, who were not related by blood to the testator, were the sole beneficiaries, and that Henry Breternitz, the husband, was the sole executor; that (31)

the will disinherited the children of the testator; that it revoked a prior will which gave to Breternitz and his wife $400 and devised the remainder of his property to be equally divided between his children; that it was executed in the home of Breternitz two weeks after he went there, and that during that time other persons had little or no opportunity of communicating with him; that at the time of its execution no one was present except Breternitz and his wife and the attorney who wrote the will, and two witnesses who were called in to sign it after it had been written by the attorney; that Breternitz went after the attorney and that the wife of Breternitz paid him for his services; that the testator did not know the attorney, and the attorney says in his evidence that after he reached the home "I asked him (Mueller) if he had any children, and he said 'Yes; but I want to give my property to Mr. Henry Breternitz and his wife.' I asked him if he had any particular property that he wanted to give to either, but he said 'It did not make any difference to him; that whichever way they wanted it would be satisfactory to him' "; that there is no evidence that the relationship between the testator and his children was not friendly and affectionate.

In our opinion, these circumstances were fully sufficient to justify submitting the question of undue influence to the jury. There are several exceptions to the evidence which we need not consider in detail.

The objection to the evidence of the son is under section 1631 of the Revisal, but it cannot be sustained because it does not appear that he testified to a communication or personal transaction with the deceased, and as appears from the brief of the propounders, it was favorable to them and tended to sustain their contention.

There is

No error.

Cited: Plemmons v. Murphey, 176 N. C. 677 (1f, 2f); *In re Hardee,* 187 N. C. 383 (1g, 2g); *In re Stephens,* 189 N. C. 272 (2f); *In re Hurdle,* 190 N. C. 224 (1f, 2b); *In re Will of Efird,* 195 N. C. 84, 89 (1f, 2b); *In re Will of Beale,* 202 N. C. 622 (1f, 2f); *In re Will of Turnage,* 208 N. C. 132 (1f, 2b); *Greene v. Greene,* 217 N. C. 653 (1f); *In re Will of Harris,* 218 N. C. 461 (1f, 2b); *In re Will of Ball,* 225 N. C. 95 (2b); *In re Will of Kestler,* 228 N. C. 217 (2g).

C. M. TOWNSEND, EXECUTOR, v. JOHN A. ROWLAND, ADMINISTRATOR.

(Filed 3 November, 1915.)

1. Estates — Remainderman — In Possession — Accounting — Rents and Profits—Promise to Pay—Reference—Evidence—Conclusion of Law.

While the life tenant, in the absence of a valid conveyance of the rents and profits, is ordinarily entitled to recover them from the remainderman when both live together upon the land, this does not apply between mother and son when they are living thereon, with the latter's family, for a long term of years, the son taking full charge and management of the lands and supporting them all therefrom; and when the matter has been referred and the facts so found and approved by the trial judge, it is sufficient to sustain the conclusion of law, in the absence of a promise to pay on the part of the son, that he is not chargeable with the rents and profits.

2. Estates—Remainderman in Possession—Rents and Profits—Burden of Proof.

In an action to recover rents for the life estate in lands from the remainderman in possession, evidence of the value thereof for the time of such possession must be introduced by the plaintiff in order for him to recover them.

APPEAL by plaintiff from *Allen, J.*, at the October Term, 1914, (32) of ROBESON.

This action was originally instituted 9 December, 1910, by a mother against the administrator of her deceased son to recover the rents and profits of a tract in which the plaintiff was a life tenant and her son the remainderman. The mother dying in May, 1913, pending the action, her executor was substituted as plaintiff. There was a consent reference to Prof. N. Y. Gulley as referee, who found the facts and held as a matter of law thereon that the plaintiff was not entitled to recover anything. On exceptions filed by the plaintiff the judge approved all the findings of the referee, both as to law and fact, and from the judgment entered thereon the plaintiff appealed.

Sinclair, Dye & Ray and Johnson & Johnson for plaintiff.

T. A. McNeill, Jr., and McIntyre, Lawrence & Proctor for defendant.

CLARK, C. J. There was evidence to support the findings of fact, and they are therefore conclusive. The only question presented by the appeal is whether the court correctly applied the law to the facts.

It is true, as contended by the plaintiff, that the life tenant, in the absence of a valid conveyance of the rents and profits, was entitled to have them for her own use, and that the mere fact that she permitted

her son, the remainderman, and his family to live in the house with her for a number of years as one family would not estop the life tenant from recovery of the value of the rents. But in this case the referee finds as a fact that, during the period from 1888 to 1910, the plaintiff and her son and his family all lived together on the farm as one family, eating at the same table, the living expenses being paid from the products of the farm; that the son controlled and managed the farm, paid all expenses thereto, supported his mother and supplied all her wants just as he did the other members of the family; that the son cleared, drained and ditched the land, erected buildings thereon, listed and paid the taxes, and acted in all respects as though he owned the land in fee simple. The land was mortgaged several times by the plaintiff and her son, among these being a mortgage for $12,000, and this money was with the consent of the mother used by the son in discharging his debts, and no part was used by the mother. In 1907 the mother and son joined in a lease of the land for five years at $2,500 per year.
(33) The rents for 1908 and 1909 were collected by the son and applied to payment of the expenses of the family, including the plaintiff, to the payment of the interest due on the mortgage, to payment of taxes and to debts for the family expenses. The rent for 1910 was paid to the administrator of the son, who use the same in the same manner as the rents of 1908 and 1909 had been applied. There was no agreement between the son and his mother that he should pay any rent for the lands; no rent was ever paid by him, and at no time between 1888 and his death in 1910 did plaintiff make any demand upon him for payment of rent. After his death no demand was made by her upon the administrator of the son for rent. The plaintiff made no demand upon the lessee for the rent.

The court properly held that the mother, now represented by her executor, was not entitled to recover. She testified that she did not bring the suit (nor direct it to be brought), and did not know that it had been brought; that she never collected any rent from her son nor had any contract with him to pay rent; that she and her son with his wife and children all lived together as members of the same family and were supported by what was made on the farm.

This course of living extended over a period of twenty-two years, and we think justifies the finding of the referee, approved by the court below, that there was no contract, express or implied, for payment of rents for the years 1908, 1909, and 1910. The most that the plaintiff could recover is the cost of her support from the death of the son in April, 1910, till the end of the year. By the course of living for twenty-two years there was an implied agreement that she was to receive her support in lieu of rents. It does not appear in the evidence what this

support for last nine months of 1910 was worth, the burden of proving which was upon the plaintiff, nor that the mother did not receive such support, and the judgment should be affirmed.

It appears from the mother's testimony that she had loaned her son some money and that she thought this action had been brought to collect that. The rents for the years 1911, 1912, and 1913 are not involved in this action. After five years litigation the judgment is now

Affirmed.

J. C. BIGGS, RECEIVER, v. W. T. BOWEN ET AL.

(Filed 3 November, 1915.)

Receivers—Insolvent Corporations—Residence—Actions—Venue — Interpretation of Statutes.

Where a receiver of an insolvent corporation resides in a different county from the concern he represents, and brings action to recover damages for breach of contract he has made, as such, with parties residing elsewhere in the State, the venue of the action is determined by the place of residence of the receiver and not necessarily by that of the insolvent corporation. Revisal, sec. 424.

APPEAL by defendants from *Daniels, J.*, at the June Term, 1915, (34) of WAKE.

Motion by defendants to remove this cause to the Superior Court of Cumberland, from Wake County.

The court denied the motion and defendants appealed.

R. W. Winston for plaintiff.

Show & MacLean, E. F. Young, Charles Ross, Sinclair, Dye & Ray for the defendants.

BROWN, J. At August Term, 1913, of Bladen Superior Court, the plaintiff was appointed receiver of the Newton-McArthur Lumber Company, which is a North Carolina corporation, with its principal place of business and all of its property in Bladen County. Plaintiff was appointed receiver in an action entitled Harnett Lumber Company v. Newton-McArthur Lumber Company and others, pending in Bladen.

At October Term, 1913, of Bladen Superior Court, by consent, said action of Harnett Lumber Company v. Newton-McArthur Lumber Company was removed to the Superior Court of Cumberland County. On 29 December, 1913, the plaintiff entered into a contract with the defendant Bowen.

The other defendants in this action executed Bowen's bond in the sum of $10,000 for the faithful performance of said contract. This contract was executed in Wake County by the plaintiff, and in Cumberland County by the defendants except Smith, who executed it in Harnett.

The plaintiff, at the time of his appointment as receiver, and of the making of the contract with defendant Bowen and of the institution of this action, was a resident of Wake County. The defendants Bowen, McGougan and Honeycutt were at said times residents of Cumberland County. Defendant Smith was a resident of Harnett County, and has since removed to Hoke County, and the defendant Ellington is now a resident of Johnston County.

(35) Bowen failed to perform said contract, and at the September Term, 1914, of Cumberland Superior Court, after due notice to all the defendants, the court found that Bowen had failed to perform said contract, and directed plaintiff to take possession of the property which had been turned over to Bowen under the contract, and authorized and empowered the plaintiff to bring an independent action, if so advised, to recover of Bowen and his bondsmen damages for breach of said contract.

This action was accordingly brought to December Term, 1914, of Wake Superior Court, to recover damages for breach of said contract. The venue of this action is governed by Revisal, sec. 424, wherein it is enacted that "In all other cases the action shall be tried in the county in which the plaintiffs or the defendants or any of them shall reside at the commencement of the action."

It is admitted that the plaintiff resided in Wake at the commencement of the action, but defendants contend that because plaintiff was appointed receiver in Bladen and afterwards the action in which he was appointed was removed to Cumberland, the proper venue is the latter county. The authorities seem to be uniform that in determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators. 11 Cyc., 869, and notes.

Where plaintiff resides at the time the cause of action arose has reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. *Smith v. Patterson*, 159 N. C., 140; *Whitford v. Ins. Co.*, 156 N. C., 43; *Rankin v. Allison*, 64 N. C., 674.

The receiver in this case is the real party in interest within the meaning of the statute. Revisal, sec. 400. This applies to a trustee of an express trust. Section 404. Alderson on Receivers, 266.

In the Federal jurisdiction in actions by or against persons acting in a representative capacity, such representatives or fiduciaries stand upon their own citizenship, without regard to the citizenship of those whom they represent. 4 Enc. U. S. Rep., 957.

It is uniformly so held by the Supreme Court of the United States: "Representatives may stand upon their own citizenship in the Federal courts, irrespective of the citizenship of the persons whom they represent, such as executors, administrators, guardians, trustees, receivers," etc. *Mexican Cent. Ry. v. Eckman,* 187 U. S., 434; *New Orleans v. Gaines,* 138 U. S., 434; 4 Fed. Stat. Anno., page 293.

Affirmed.

Cited: Lawson v. Langley, 211 N. C. 530 (f); *Barber v. Powell,* 222 N. C. 135 (p); *Indemnity Co. v. Hood,* Comr., 225 N. C. 362 (g).

(36)

ELLINGTON & GUY, INC., v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 3 November, 1915.)

Carrier of Goods—Open Bill of Lading—Ownership of Goods—Presumptions—Evidence.

The consignee of a shipment of goods is regarded as the owner thereof when received by the carrier under an open bill of lading given therefor to the consignor, without anything to indicate to the contrary, and in an action by the latter to recover damages to the shipment, such paid bill of lading alone is no evidence of the ownership by the consignor of the goods, the presumption being that the consignee paid it, and upon the evidence the consignor cannot recover.

APPEAL by defendant from *Peebles, J.,* at the March Term, 1915, of LENOIR.

Action to recover damages for negligence in the transportation of a carload of lumber from Kinston, N. C., to Gloucester, N. J.

The defendant moved for judgment of nonsuit at the conclusion of the evidence of the plaintiff and renewed the motion at the conclusion of the whole evidence. The motion was overruled and the defendant excepted. There was a verdict and judgment for the plaintiff and the defendant appeals.

G. V. Cowper and R. H. Lewis, Jr., for plaintiff.

Rouse & Land for defendant.

ALLEN, J. The plaintiff, who is the consignor of certain lumber shipped under an open bill of lading, is prosecuting this action to recover damages for negligence in the transportation of the lumber. He has offered no evidence tending to prove that the lumber was shipped on consignment or that he retained any interest therein, nor has any evidence been introduced tending to show that he has suffered damage. He attempted to prove that he had been compelled to pay additional and increased freight charges by reason of the negligence of the defendant, but the only evidence of this fact is a freight bill which was produced by the defendant upon notice, which only shows a payment of the freight and does not indicate whether it was paid by the consignor or consignee.

As the consignee becomes the owner of goods shipped upon an open bill of lading at the time of delivery to the common carrier, nothing else appearing, he is *prima facie* liable for the freight, and in the absence of proof to the contrary it would be presumed that he paid it. Hutchison Carriers, vol. 2, sec. 807.

On these facts and in this condition of the record it is clear that the plaintiff is not entitled to recover and that the motion for judg-
(37) ment of nonsuit ought to have been sustained. *Stone v. R. R.*, 144 N. C., 222; *Mfg. Co. v. R. R.*, 149 N. C., 262 *Buggy Co. v. R. R.*, 152 N. C., 122.

In the last case *Justice Hoke* reviews the authorities and states with clearness and accuracy the principles that are controlling in this State. He says: "The decisions of this State uphold the position that where goods are shipped with a common carrier, under circumstances importing absolute ownership of same on the part of the consignee, and of all pecuniary and beneficial interest in the contract of shipment and its proper performance, the right to recover damages for delay in the shipment, or negligent injury to the goods during their transportation, rests in the consignee, and he alone can maintain an action for such wrong. Our authorities are also to the effect that where a vendor ships goods to a vendee on an ordinary and open bill of lading, the purchaser designated as the consignee in such bill of lading is *prima facie* the owner of the goods, and of all interest in the contract of shipment; and, in the absence of any evidence tending to qualify or restrict the conditions stated, on injury wrongfully suffered, the consignee and not the consignor is the proper party to institute and maintain the suit. . . . It is open to the consignor to sustain his right to sue on the contract by evidence relevant and sufficient tending to qualify the conditions indicated. Thus he may show that the goods were shipped under stipulations that in effect retained the title thereto, or some interest therein, in the consignor, as in *Mfg. Co. v. R. R.*, 149 N. C., 261; or that the goods

were shipped on consignment, or under other circumstances showing that the consignor has a pecuniary and beneficial interest in the proper performance of the contract of shipment, as in *Summer's case,* 138 N. C., 295, or in *Rollins' case,* 146 N. C., 153, or *Cardwell's case,* 146 N. C., 218; or it may be shown that, owing to the carrier's default, the parties have rescinded the contract and restored the title to the consignor before action brought, as in *R. R. v. Commercial Guano Co.,* 103 Ga., 590."

Reversed.

Cited: Anderson v. Express Co., 187 N. C. 173 (b).

ROBERT RICHARDSON v. S. C. HOBGOOD, SHERIFF.

(Filed 3 November, 1915.)

Appeal and Error—Fragmentary Appeals—Final Judgment.

An appeal is premature and will not lie from an order that the sheriff hold the proceeds of sale of a horse and buggy seized under the "Search and Seizure" act of 1915, to await final judgment, the case appearing to be heard upon a case agreed to test the validity of the act.

APPEAL by plaintiff from *Allen, J.,* at the July Term, 1915, of (38) GRANVILLE.

T. Lanier for the plaintiff.
No counsel for the defendant.

BROWN, J. This matter seems to have been heard upon facts agreed, and from the judgment rendered the plaintiff appealed. The purpose of the action seems to be to recover from the defendant, sheriff of Granville County, a horse and buggy and other property of the plaintiff seized by the sheriff for violation of the liquor laws of the State under the "Search and Seizure" act of 1915, which authorizes the seizure of vehicles as well as liquor.

The purpose of the plaintiff evidently is to contest the validity of such law, but we think the appeal is premature, as no final judgment has been rendered in the action. The only order made at July Term, 1915, adjudges that the defendant hold the property or the proceeds of the sale thereof to await final judgment in this action.

In the record is a written agreement, signed by the counsel for the plaintiff, that the defendant sheriff may sell the horse and buggy seized by him, and hold the proceeds to await final judgment in this action.

The record sent up to this Court contains no final judgment, and none seems to have been rendered. The appeal is, therefore, premature, and is

Dismissed.

LEO BROWN v. COOK-LEWIS FOUNDRY COMPANY.

(Filed 3 November, 1915.)

1. Master and Servant—Orders of Master—Negligence—Trials—Evidence—Insufficient Help—Questions for Jury.

In an action against a foundry company to recover damages for a personal injury, when there is evidence that the plaintiff, an inexperienced helper, informed the head molder that the help he had for lifting a box weighing two thousand pounds was insufficient, and was told, in reply, to "Go ahead; the help is sufficient," and in consequence thereof the box fell upon the plaintiff and injured him when thus being lifted, and there is further evidence that, in fact, the help was insufficient, it raises a question as to the actionable negligence of the defendant therein to be determined by the jury.

2. Master and Servant—Coemployees—Contributory Negligence—Trials—Evidence—Nonsuit.

In an action to recover damages for a personal injury caused by the defendant's negligence in not providing sufficient help in lifting a two-thousand-pound box, and there is evidence to sustain the allegation, the burden of proof is on the defendant to show, when relied upon as a defense, that the injury was due to the plaintiff's contributory negligence, or that of his colaborers; and where the defendant fails to introduce his evidence thereof, a judgment as of nonsuit should not be entered, the evidence introduced being viewed in the light most favorable to the plaintiff.

3. Master and Servant—Safe Appliances—Negligence—Trials—Evidence—Proper Appliances—Instructions.

Where there is evidence tending to show that the injury complained of, in an action to recover damages for personal injury, was caused by the negligence of the defendant in failing to furnish sufficient help to raise a box weighing two thousand pounds, the exclusion of testimony by the trial judge, that a crane accessible at the time was a proper way to handle the box, and his expression that the defendant was not required to keep up with the inventive genius of Edison or George Westinghouse, etc., constitute reversible error.

(39) APPEAL by plaintiff from *Rountree, J.*, at March Term, 1915, of FORSYTH.

J. B. Craver, A. E. Holton and J. B. Poindexter for plaintiff.

Watson, Buxton & Watson for defendant.

CLARK, C. J. This was an action for personal injury sustained by the alleged negligence of the defendant. The plaintiff's allegation and proof was that while acting as general helper in the foundry he was called on by John Hartle the head molder, to help turn a box which contained a mold and sand, the box being about 4½ feet by 2 feet deep. The plaintiff testified that the box and contents weighed about 2,000 pounds, and he told Hartle that the three men were not enough to handle the box, but was directed to "go ahead." He was then directed to go around to the other side to let it down, and it fell on his foot, crushing it. He says that he had never seen that work done before, and when he said to the molder. "There are not enough men here to handle this thing," he replied, "Yes, there is; go ahead." There were other witnesses who testified that it would require four men or five to properly handle the box; that three men could turn it only by hard straining, and that they were very cramped for space, only twelve or thirteen inches between this box and another, and when the box was let down it dropped on his foot.

Upon this evidence, it was error to direct a nonsuit. The facts are almost identical with those in *Pigford v. R. R.*, 160 N. C., 93, where the plaintiff told the foreman that he needed more men to help him load, but the foreman said, as here, "Go ahead," and *Walker, J.*, in a very full and well-reasoned opinion, held: "When a servant is injured within the scope of a dangerous employment by the negligent act of the master in not furnishing him sufficient and competent assistance, and the master's negligence is the proximate cause of the injury, the servant is not held to have assumed the risk of the master's negligent act, and can recover unless his own negligence contributed to the injury as the proximate cause," and in that case the Court sustained a verdict for the plaintiff.

In this case, the defendant contends that the injury was caused by the contributory negligence of the plaintiff or by the negligence of his fellow-servants, or was an accident. It was an accident only in (40) the sense that it was not intentionally done. If there was evidence of any negligence of the plaintiff or of his fellow-servant, it was a matter of defense and for the jury. Upon the plaintiff's testimony, the injury occurred because of insufficient force to hold back the box in letting it down, as he was ordered to do, and upon a nonsuit the evidence must be taken in the light most favorable to the plaintiff. *Morton v. Lumber Co.*, 152 N. C., 54. The defendant introduced no evidence.

The plaintiff also excepted because the court refused to allow him to show by an expert, a foreman in another foundry, that "the proper way to handle these boxes was by a crane; that it was safer to do so with a crane, and it was not as safe to handle these boxes by hand as by a

crane." The judge refused this evidence, saying that "Factories do not have to keep up with Edison and his inventive genius or George Westinghouse, but they have to use the safety appliances in general use." In the exclusion of the evidence and in the reason given, the court erred. A crane is a mechanical device for raising heavy weights, in universal use for that purpose. It is not a recent invention of Edison or Westinghouse, but has been in general use for many centuries. The evidence shows that there were "two cranes in this very factory, one on the inside and one on the outside, and that these boxes could have been filled in reach of the crane." One of these cranes stood within fifteen feet of this box.

So far from the crane being of recent invention, Livy tells us (Book XXIV, ch. 34) that at the siege of Syracuse by Marcellus, 2,100 years ago, Archimedes, by the use of cranes projecting over the seawall, dropped heavy grappling irons on the decks of the Roman vessels, which, breaking through, took hold of the timbers, and then, by means of his cranes (in military Latin, *"tolleno," i.e.,* "lifter"), he drew the vessels up on end, and then, dropping the vessels, he dashed them to pieces. Smaller cranes had doubtless been in use for ordinary purposes long before that time and they have been in general use ever since. The same incident is told by Plutarch in his Life of Marcellus.

The evidence as to the failure to use the cranes, and that it was safer to use them, should have been admitted.

The judgment of nonsuit is

Reversed.

Cited: Hickman v. Rutledge, 173 N. C. 179 (2p); *Avery v. Palmer,* 175 N. C. 382 (1d); *Harris v. Durham,* 185 N. C. 572 (1f); *Johnson v. R. R.,* 191 N. C. 80 (1f); *Jarvis v. Cotton Mills,* 194 N. C. 688 (1b).

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(41)

JOHN D. FRINK AND WIFE, S. J. FRINK, v. F. M. TYRE.

(Filed 3 November, 1915.)

1. Mortgages — Sales — Balance Due — Payment Into Court — Tender of Judgment—Injunction.

A sale under a power thereof contained in a mortgage securing four notes maturing at different times, will be restrained in an action brought by the mortgagor for that purpose when it appears that the plaintiff has paid into the court for the defendant a small balance due on the first and only note matured at the time, and has tendered a judgment for the costs.

2. Same—Costs—Appeal and Error.

Where the sale under a power thereof will be enjoined upon payment into court of the balance due on the first and only matured note, the costs will be taxed against the mortgagor, having the sale enjoined, including the cost of judgment, the mortgagee having the right to sell at the time; and in this case, the judgment being modified and affirmed on appeal, the costs thereof are taxed against the mortgagor, the plaintiff.

APPEAL by defendant from *Whedbee, J.*, at the February Term, 1915, of COLUMBUS.

Action commenced on 17 December, 1914, to restrain a sale under a power contained in a mortgage executed to secure four notes, falling due respectively 1 June, 1914, 1915, 1916 and 1917. The mortgage authorizes the mortgagee to sell upon failure to pay either note or any installment of interest, but there is no provision that upon such failure the whole indebtedness shall become due.

When the action was commenced there was a small balance due on the first note, which the plaintiff paid into the clerk's office for the defendant, and at the same time tendered a judgment for costs.

His Honor directed the money in the clerk's office to be paid to the defendant, continued the restraining order in force until the second note becomes due, and refused the motion for costs.

MacRacken & Greer for plaintiff.
Irvin B. Tucker for defendant.

ALLEN, J. The judgment and order of the Superior Court will be modified in accordance with the principles stated in the syllabus by charging the plaintiff with the costs of the action.

Modified and affirmed.

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(42)

HERBERT STELGES v. MARY F. SIMMONS.

(Filed 10 November, 1915.)

1. Wills—Probate—Relating Back—Judgment—Execution Sales — Innocent Purchaser — Deeds and Conveyances — "Color" — Limitation of Actions.

The principle that a proceeding to establish a last will is a proceeding *in rem*, and that when the will is established it relates back to the death of the deceased owner and vests the title to the property in his devisee, cannot operate to affect the title to lands acquired by an innocent purchaser for value without notice, who has acquired his deed under a judg-

ment against the one under whom his adversary party claims title, and has been in possession of the lands for more than seven years under his deed as color of title.

2. Escheat — Judgments — Execution Sales — Deeds and Conveyances — Laches—Innocent Persons—Equity.

Where a judgment final has been obtained by default of an answer in the course and practice of the court and regular upon its face in favor of the University of North Carolina, by escheat, against the husband of the deceased owner of the land, who had died without issue born alive, and more than seven years thereafter the husband sets up a will in his favor from his deceased wife, and claims the lands thereunder from the grantee of a purchaser at the execution sale, who, with his grantor, have been in possession for more than seven years under their deeds, the will cannot relate back to the death of the testator as against the title of the purchasers, being free from laches, for where one of two innocent persons must suffer, the one who has not been guilty of laches will be protected.

3. Same—Default—Estoppel.

Where a judgment by default final has been rendered, for the want of an answer, in the course and practice of the courts in proceedings regular upon their face, in an action to recover lands, the complaint alleging that the plaintiff is the owner thereof, and no motion in the cause to have it set aside for excusable neglect has been made within twelve months and no independent action has been brought to set aside the judgment for fraud, it will estop the defendant from asserting any right he may have to the land.

4. Limitation of Actions—Heirs at Law—Wills—Devisees—Interpretation of Statutes.

Revisal, sec. 369, suspending the statute of limitations during controversy over the probate of a will "when no administrator is appointed" applies only to protect creditors, there being no one for them to sue.

WALKER and HOKE, JJ., concur in the result.

APPEAL by plaintiff from *Rountree, J.*, at the June Term, 1915, of NEW HANOVER.

S. M. Empie and E. K. Bryan for plaintiff.

H. E. Faison, Isaac C. Wright and H. McClammy for defendant.

CLARK, C. J. Isaac Carr and Neely Carr were husband and wife, the latter being the owner and in possession of the land in contro-
(43) versy in Wilmington. She died without issue or any relative, in 1896. No will was found or probated. There being no proceeding to sell her land to make assets and no suggestion of any debts, on 9 January, 1904, the University of North Carolina brought an action in

ejectment in New Hanover for this tract of land against Isaac Carr, who was in possession and on whom the summons was personally served. The complaint was duly filed alleging that the University was the owner in fee and entitled to immediate possession of the property in controversy (the decedent not having had issue born alive) and that the defendant unlawfully and wrongfully withheld the possession from the plaintiff. Judgment by default final was rendered at February Term, 1904, adjudging the plaintiff to be the owner of the land and directing a writ of possession to issue under which Isaac Carr was dispossessed, and plaintiff in that action was put into possession on 11 July, 1904. The University executed a deed to W. H. Shearin for said land in consideration of $410, who on 19 October, 1904, conveyed the same to the defendant, Mary F. Simmons, for full value, by warranty deed. She has been in possession ever since. This action in ejectment was begun against her 10 August, 1914, nine years nine months and twenty-one days after the defendant took possession under her deed, and more than ten years after the University was put into possession. On 16 March, 1905, more than a year after the judgment declaring the University the owner of the land, and more than a year after Isaac Carr was dispossessed and five months after the purchase of the land by this defendant for full value, Isaac Carr brought a proceeding before the clerk to establish an alleged lost will of his wife devising this land to him. The defendant appeared, pleaded that Isaac Carr was estopped to set up a will or claim any interest in the land by the aforesaid judgment of the University against Isaac Carr, and that the laches of Isaac Carr in waiting till Mary F. Simmons had bought and paid for the land, or to give any notice of it, was a bar to the proceeding so far as Mary F. Simmons and the University were concerned. This plea was sustained by *O. H. Allen, J.*, and no appeal was taken. In 1907 Isaac Carr died, leaving a will under which the plaintiff claims. In 1913 judgment was rendered setting up the lost will of Neely Carr, against whom it does not appear, as she left no issue or collateral kin.

The plaintiff, devisee of Isaac Carr, but not related to Neely Carr in any way, brought this action 10 August, 1914, eighteen years after her death. The court properly rendered judgment dismissing the action, for several reasons:

1. The defendant and those under whom she claims have been in adverse possession under known and visible metes and bounds, openly and notoriously claiming the same under color of the title for more than ten years. It was admitted that the title was out of the (44) State and in Neely Carr.

2. The defendant was an innocent purchaser for value of said land without notice of any defect in the title.

The plaintiff's claim is that a proceeding to establish a lost will is a proceeding *in rem,* and that when the will was established in 1913 it related back to the death of Neely Carr and vested the title in Isaac Carr, though he was dead, and through his devise, in this plaintiff; but this cannot divest defendant's title. In *Harrison v. Hargrove,* 120 N. C., 96, it was held: "Where a court of competent jurisdiction of the subject-matter recites in the judgment or decree that service of the summons has been made upon the defendants, who are subject to the jurisdiction of the court, and the judgment is regular on its face, an innocent purchaser under such judgment will be protected even though it should be afterwards set aside on the ground that in point of fact there had been no service of process, and the judgment is conclusive against all persons."

In this case service was personally made upon Isaac Carr. He made no defense and the judgment was regularly entered, and under the writ of possession issued thereon the plaintiff therein, the University, was put in possession, and through *mesne* conveyances the defendant, Mary F. Simmons, for full value and without notice, bought the land, and has ever since been in possession. She has been guilty of no laches, but Isaac Carr was. He delayed from 1896 to 1905 to set up the will (if there was one) and did not defend in 1904 the action alleging that there was no will. The rule of justice and of law is that when one of two innocent persons must suffer the one who has been guilty of no laches is protected.

3. The plaintiff is estopped to claim title to this land by the judgment of *Ferguson, J.,* at February Term, 1904, and by the judgment of *Allen, J.,* which held that such judgment of *Ferguson, J.,* was an estoppel. A judgment is *res judicata* of all the points raised by the pleadings or which might properly be predicated upon them. *Tyler v. Capehart,* 125 N. C., 64, and citations to that case in the Anno. Ed. This is true, even though the judgment is by default final, *Junge v. McKnight,* 137 N. C., 285, and this, even though the complaint in a suit be not verified, if the defendant gives no defense bond. *Patrick v. Dunn,* 162 N. C., 19.

The fact that the University obtained judgment under an escheat and that the plaintiff is now setting up the plea of a lost will are purely incidental matters which can in no wise affect the real principle here involved upon which the stability of all judgments rests, to wit, that

(45) when the defendant (Isaac Carr) was served with summons and the complaint alleged that as against him the plaintiff (the University) was entitled to the land in controversy and judgment was duly entered thereon, Isaac Carr and all those claiming under him thereafter are bound by that judgment, which was rendered in due course. It could only be set aside within twelve months for excusable neglect or by an independent action for fraud. This has not been attempted. The

judgment was regular in every respect. No fraud has been alleged. The present plaintiff alleges that Isaac Carr had a defense if he had known it. The same plea, if valid, could be set up against any other judgment. Isaac Carr was guilty of laches, for his wife died in 1896, and eight years had passed before the judgment was rendered. The defendant has been guilty of no lache. She paid full value for the land without notice of any defect in the title, and relying upon the integrity of a judgment which adjudicated the title and possession of the realty, and is entitled to the same protection as a purchaser under any other judgment, regularly taken in due course. She should not now be deprived of her property, bought upon the faith of a judgment adjudicating the title in those under whom she claims, and against the party under whom the plaintiff claims. This would be an injustice to her and would grievously shake the faith to be reposed in the judgments of the courts regularly taken in due course.

The judgment of February, 1904, was conclusive and is unimpeachable that the University had the title and was entitled to possession of the land in controversy, and that Isaac Carr did not have the title. If he had the defense that there was a will devising the title to him, it was his duty then to set it up. He did not do so, but submitted to the judgment that there was no will. There being no fraud nor excusable neglect, the devisee of Isaac Carr cannot now set up the claim that in fact at that time and for eight years prior thereto Isaac Carr had the title to the land. Whenever the will was probated his title dates back to the death of his wife in 1896, but this cannot invalidate the judgment that in February, 1904, the title was in the University.

It is true that the judgment of 1904 was judgment by default final. But it was regular in all respects, taken in due course, upon a verified complaint alleging that the University was owner in fee of the land described and that the possession was wrongfully withheld by Isaac Carr, the defendant. This put the title in issue and operated as an estoppel in any subsequent action by Isaac Carr, or by this plaintiff claiming under him, to recover the land from the plaintiff in that action or from this defendant who claims under it. Such judgment binds parties and privies. This proposition is too well established to be controverted. It is fully discussed in *Turnage v. Joyner,* 145 N. C., 81, with full citation of authorities, and that case has been cited since with approval. See Anno. Ed.

This is an action of ejectment, and stripping the case of its (46) purely incidental and adventitious features that the land was adjudged to be an escheat, and that a lost will has been set up, the defendant, who is a purchaser for value and without notice, not only is justly

entitled to protection as such, but there are two insuperable bars to recovery by this plaintiff:

1. She has pleaded and is entitled to protection by the fact that she "has been in the open, notorious and adverse possession of the land and premises set out in the complaint under known and visible boundaries for more than seven years, under color of title, next before the commencement of this action, and she pleads the seven years adverse possession," and this plea is good against all the world.

2. She is further entitled to protection against this plaintiff because he claims under Isaac Carr, and the defendant claims as *mesne* purchaser for value under a judgment entered in due course at February Term, 1904, in which judgment it was adjudged that Isaac Carr did not have title to this property and wrongfully held possession against the plaintiff in that action, who was adjudged to have the true title, and that by writ of possession said plaintiff in that action, under whom the defendant holds, was put into possession. The defendant is therefore secured by adverse possession and further by a previous adjudication of the title in favor of the party under whom she derives title and against the party under whom the plaintiff seeks to recover.

Revisal, sec. 369, suspending the statute of limitations during controversy over the probate of a will "when no administrator is appointed," applies only to protect the creditors of the estate, because there is no one to sue. It does not apply to the heirs at law or devisees to nullify the protection given every one in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee that the title to the property is in another. Isaac Carr for more than seven years made no movement to set up the will, and is bound by the judgment against him that there was no will.

This is not the case where an unknown heir or devisee is discovered (though even he would be barred by seven years adverse possession), who, not claiming under Isaac Carr, would not be bound by the judgment against him; but the plaintiff claims under Isaac Carr and is concluded by the judgment against him.

The judgment of *Rountree, J.*, upon the facts agreed, that the plaintiff is not entitled to recover, and dismissing the action at the cost of the plaintiff, is

Affirmed.

WALKER, J., and HOKE, J., concur in result.

Cited: Jernigan v. Jernigan, 178 N. C. 85 (3b); *Gillam v. Cherry,* 192 N. C. 198 (3g); *Scales v. Trust Co.,* 195 N. C. 776 (3g); *Bank v. Liles,* 197 N. C. 418 (2f); *Clinard v. Kernersville,* 217 N. C. 687 (3g).

W. BENT WILSON ET AL., TRADING AS WILSON & ADAMS, v. DAVID J. LEWIS ET ALS.

(Filed 10 November, 1915.)

1. Bills and Notes—Negotiable Instrument—Holders—Fraud in Procurement—Burden of Proof.

Where fraud in the procurement of a note has been shown in an action brought by one claiming to be a holder in due course, the burden of proof is on the plaintiff to show that he acquired the paper before maturity, in good faith for value, without notice of any infirmity or defect in the title of the person negotiating it, and upon his failure to do so it sets aside the contract in its entirety, including, in this case, a stipulation that the maker will return the stallion for which the note was given, if not as warranted, and receive another of equal value. *Robinson v. Huffstetler*, 165 N. C., 464, cited and distinguished.

2. Same—Trials—Issues.

Where a note given for a stallion is sent on by one claiming as holder in due course and the jury has rendered a verdict upon which the note was invalidated for fraud, an issue as to the indebtedness of the defendant for the horse does not arise.

APPEAL by plaintiff from *Allen, J.*, at the November Term, (47) 1914, of COLUMBUS.

Action upon three notes, aggregating $3,000, given for the purchase of a German coach stallion. The notes were executed to J. Crouch & Son, and indorsed by them to the plaintiffs, who claim to be purchasers for value before maturity. The defendants allege that the notes were procured by fraud, and that the plaintiffs took the notes with notice.

There was a verdict and judgment in favor of the defendants and the plaintiffs appealed.

Schulken, Toon & Schulken for plaintiffs.

McLean, Varser & McLean and Homer L. Lyon for defendants.

ALLEN, J. We find no error in the exceptions relied on by the plaintiffs, which we have carefully examined, and as the legal principles involved have been so recently considered in the various appeals from judgments in actions to recover on notes for the purchase price of stallions it is unnecessary to further discuss them.

The evidence excepted to was competent and material on the issue of fraud, and when fraud was established it had the effect of casting the burden on the plaintiffs, as holders of the notes, of showing that they acquired them (1) before maturity, (2) in good faith for value, (3) without notice of any infirmity or defect in the title of the person nego-

tiating them (*Bank v. Fountain,* 148 N. C., 590), and it also set aside the contract in its entirety, including the stipulation to return the horse, proved to be practically worthless, and to receive another of "equal value" to the one represented.

(48) In cases like *Manufacturing Co. v. Lumber Co.,* 159 N. C., 510, and *Robinson v. Huffstetler,* 165 N. C., 464, where "contracts of sale or return" were enforced, the party aggrieved was not attacking the contract, but was declaring on the warranty.

We are also of opinion that there is evidence that the plaintiffs had notice of the fraud equally strong as that commented on and discussed in the learned opinion of *Associate Justice Walker* in *Bank v. Branson,* 165 N. C., 346.

There was also no error in refusing to require the jury to answer an issue as to indebtedness, as the plaintiffs bought nothing except the notes and had no interest in the horse, and the plaintiffs were entitled to no judgment as the jury found the notes were procured by fraud, and that the plaintiffs took with notice of the infirmity.

No error.

Cited: Starnes v. R. R., 170 N. C. 225 (2f); *Bank v. Sherron,* 186 N. C. 299 (1f).

JOHN HANBY FOARD, BY HIS NEXT FRIEND, CHARLES D. FOARD, v. THE TIDEWATER POWER COMPANY.

(Filed 10 November, 1915.)

1. Carriers of Passengers—Street Railways—Crossties—Right of Way—Negligence—Evidence.

Crossties left on the right of way of a power transportation company which had been repairing its railway track afford no evidence of negligence in an action to recover damages of the company for a personal injury alleged to have been inflicted in consequence thereof.

2. Carriers of Passengers—Street Railways—Pedestrians—Crossing Track—Place of Safety—Contributors—Negligence.

Where a pedestrian using the track of a railway company is in a place of safety and seeing a rapidly moving car approach about fourteen feet away, and knowing the danger, attempts to cross the track and is injured, the rule requiring the employees on the car to give warnings of its approach has no application, and there being no evidence of the company's negligence, the contributory negligence of the pedestrian bars his recovery in an action for damages against the company.

3. Carriers of Passengers—Street Railways—Contributory Negligence—Nonsuit.

Where it appears by the plaintiff's own evidence, in his action to recover damages for a personal injury he alleges to have been inflicted on him by the defendant's negligence, that the proximate cause of the injury was the contributory negligence of the plaintiff, a judgment as of nonsuit thereon is proper.

4. Same—Children—Evidence.

The rule that the contributory negligence will bar the right of recovery of one who knowingly leaves a place of safety and attempts to cross a car track in the face of danger, and is injured by a rapidly moving street car, which he, at the time, saw about fourteen feet away, applies to children eleven years of age who are shown to have been intelligent, were accustomed to ride on the cars and evidently appreciated the danger in taking such risks.

APPEAL by defendant from *Allen, J.*, at the December Term, (49) 1914, of NEW HANOVER.

Civil action tried upon these issues:

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

2. Did plaintiff, by his own negligence, contribute to his injuries, as alleged? Answer: "No."

3. What damage, if any, is plaintiff entitled to recover of defendant? Answer: "Fifteen hundred dollars ($1,500)."

From the judgment rendered, defendant appealed.

John D. Bellamy & Son for the plaintiff.

Davis & Davis for the defendant.

BROWN, J. The defendant made the usual motion to nonsuit, which was overruled. This is assigned as error.

The plaintiff was struck and injured by defendant's motor car while walking along the right of way on the north side of the track and just outside the edge of the crossties near Light House Station, at Wrightsville. He was not a passenger and had no immediate intention of becoming one, but was going to the water to secure a boat for fishing. The defendant had been repairing its roadbed, and crossties were piled on the right of way and along the track. The plaintiff, when struck, was between these ties and the track.

The allegations of negligence are that the defendant had piled these crossties four feet high along the track so that plaintiff was compelled to walk between the ties and the track, in consequence of which he was

struck by defendant's car, and that the car was being run at an excessive rate of speed and failed to give any signal.

We are unable to discover wherein the defendant failed in the performance of any duty it owed the plaintiff, and that is the test of negligence. It had a right to pile its crossties on its right of way. It had no other place to pile them.

The approach to the station was not obstructed, and if it was, plaintiff was not seeking the station, but was on his way fishing. As to the excessive speed, all the evidence fixes it at twelve to twenty miles an hour. It is a matter of common observation that trolley cars run from twelve to twenty miles an hour and are stopped with extraordinary suddenness and with perfect safety. One witness says the speed was "*unusual,*" but there is no evidence that it was dangerous or reckless. But assuming that to be true, it was not the proximate cause of plaintiff's injury.

The car was only fourteen feet from plaintiff when he saw it, and he left his safe position and started between the track and crossties. The motorman had the right to suppose that the plaintiff would re-
(50) main where he was. It is not pretended that the motorman could then stop his car and avoid the injury after plaintiff advanced between the track and the ties. No such issue was tendered.

However this may be, we think that the motion to nonsuit should be allowed upon plaintiff's own evidence. It is well settled that where upon plaintiff's testimony he is guilty of contributory negligence, the motion to nonsuit should be sustained.

The plaintiff testified: "When I first saw the car, it had passed on the ground from the trestle. I had not then reached the light house. When I was hurt, I was not near the door of the light house. I had not gotten to the pole in front of the door of the light house. I saw the train fourteen feet off. I was not on the track then. I was far enough from the track to keep from getting hit."

He repeated the statement that he was not on the track when he saw the car approaching and not on the crossties. When plaintiff saw the car approaching, he was, according to his own admission, in a place of safety, and had he remained there and not ventured further on between the pile of ties and the track, he would not have been hurt.

It is immaterial whether the motorman whistled or not. The plaintiff actually saw the car approaching, and surely he could not have better notice than his own eyes gave him. He should have stopped and let the car pass. He was in a place of perfect safety, and he should have remained there.

There is no evidence and no finding that after the plaintiff walked on between the ties and the track the motorman could have stopped the car in time to avoid injuring him.

Upon these facts, it requires no citation of authority to sustain the proposition that plaintiff cannot recover unless because of his age he is by law relieved of the consequences of his own negligence.

The plaintiff, at the time of the accident, was a boy of eleven years of age. The testimony introduced shows him to be a bright boy with average intelligence. The plaintiff testified that he had been getting on and off cars for the past four or five years; and his father testified that he was a boy of intelligence and had the capacity to understand the dangers of a street car. The plaintiff's witness, Dr. Cranmer, testified that he considered him to be a fairly bright boy, good average intelligence.

All the evidence, without contradiction, shows the plaintiff to be capable of understanding and appreciating the danger of leaving his position of perfect safety and venturing between the pile of ties and the track in front of a rapidly approaching car. It requires no great degree of intelligence or of experience to understand that it is dangerous to get in front or very near a rapidly moving car. Dumb animals understand this quite as well as human beings. In this case it is not (51) a question to be submitted to a jury. The facts are uncontradicted.

There is no evidence or even a claim that plaintiff was overcome by fright, and on account of his youth "lost his head" and rushed from a place of safety into a place of danger. It is a fair inference that he was in too much of a hurry to reach the water and tried to "beat the car" and get out on the other side of the ties before the car could get there. The action was probably due to the temerity of youth rather than to the irresponsibility of a mere child.

In *Baker v. R. R.*, 150 N. C., 562, this subject was fully discussed and it was held by a unanimous Court that "The inquiry, 'At what age must an infant's responsibility for negligence be presumed to commence?' cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who compose each particular jury. One jury might fix the age at fourteen and another at eighteen and another at twenty."

In *Tucker v. R. R.*, 124 N. Y., 308, the Court of Appeals of New York says: "The question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law. In the absence of evidence tending to show that a boy of twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult."

In the *Baker case, supra,* it is further said: "From all these and other approved authorities, the principle is deduced that an infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age; and if his own act directly brings the injury upon him, while the negligence of the defendant is only such exposes the infant to the possibility of an injury, the latter cannot recover. The Supreme Court of the United States has substantially held the same to be sound law in the cases above cited."

In *Meredith v. R. R.,* 108 N. C., 616, the Court says: "The witnesses concur in the statement that the boy who was injured was an intelligent youth, about thirteen years old. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety, even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the railway to a neighboring sidetrack."

Again: "The boy injured was described by witnesses as being bright and smart; but if he was apparently capable of appreciating his peril or his situation, it is sufficient to relieve the servants of the com-
(52) pany from the imputation of carelessness in assuming that he would step aside before the engine reached him."

We find in the books many cases where children of various ages from six years upwards have been held responsible for their negligent conduct. *Meredith v. R. R.,* 108 N. C., 616—13 years of age; *Nagle v. R. R.* (Pa.), 32 Am. Rep., 414—14 years of age; *Rockford v. Delaney* (Ill.), 25 Am. Rep., 308—under 14; *Dull v. R. R.* (Ind.), 52 N. E., 1013—11 years; *Fray v. R. R.,* 159 Mass., 238—10 years; *Moore v. R. R.* (Pa.), 44 Am. Rep., 106—10 years; *Cosgrove v. Ogden,* 49 N. Y., 255—6 years; *R. R. v. Cornell* (Pa.), 32 Am. Rep., 472—6 years and 9 months; *Briscoe v. Power Co.,* 148 N. C. 396—13 years; *Murray v. R. R.,* 93 N. C., 92—child of 8 jumping switch engine; *Conley v. R. R.,* 4 Am. R. R. and E. R. R. Cases, 533—7 years; *Meeks v. R. R.,* 52 Cal., 602—6 years; *Manly v. R. R.,* 74 N. C., 655—10 years; *Studer v. R. R.,* 121 Cal., 400—12 years; *Masser v. R. R.,* 61 Ia., 602—11 years.

The motion to nonsuit is allowed.

Reversed.

Cited: Mullinax v. Hord, 174 N. C. 615 (4p); *Fry v. Utilities Co.,* 183 N. C. 290 (4q); *Fry v. Utilities Co.,* 183 N. C. 296 (4j); *Nowell v. Basnight,* 185 N. C. 148 (3g); Brown v. R. R., 195 N. C. 702 (4p); Scott *v. Telegraph Co.,* 198 N. C. 798 (3f); *Tart v. R. R.,* 202 N. C. 55 (4f); *Haynie v. R. R.,* 206 N. C. 205 (4f); *Morris v. Sprott,* 207 N. C. 360 (4g); *Absher v. Miller,* 220 N. C. 198 (4g).

CITY OF WILMINGTON v. MATTIE MOORE AND ELIZA WILLIAMS.

(Filed 10 November, 1915.)

1. Constitutional Law—Legislative Powers—Back Taxes.

The General Assembly has power to enact legislation authorizing collection of back taxes, and to enforce collection by appropriate actions in courts.

2. Statutes—Legislative Powers—Back Taxes—Levy and Sale—Direct Action—Interpretation of Statutes.

Where the Legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes of the defendant are due, were properly assessed against lots of land within the limits of the municipality subject to the lien therefor, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien. Revisal, sec. 2866. *Berry v. Davis*, 158 N. C., 170, cited and distinguished.

APPEAL by plaintiff from *Justice, J.*, at the March Term, 1915, of NEW HANOVER.

Civil action to recover back taxes by foreclosing lien on realty subject thereto.

There was an act authorizing collection of the taxes, and plaintiff having developed its case so far as to show that the taxes for several back years were due and owing and that there was a piece of land available and subject to payment of same, defendant demurred *ore tenus*, insisting that the present suit could not be maintained before resort was first had to summary method of collection by levy and sale pro- (53) vided for in Revisal, sec. 2887. The court, being of that opinion, sustained the demurrer, entered judgment dismissing the action, and plaintiff excepted and appealed.

C. C. Bellamy and C. D. Hogue for plaintiff.
No counsel for defendant.

HOKE, J., after stating the case: The power of the General Assembly to enact legislation authorizing collection of back taxes and the right of the State and municipalities representing it to enforce collection by appropriate action in the courts, is fully established in this State. *City of Wilmington v. Cronly*, 122 N. C., p. 383; *S. and Guilford Co. v. Ga. Co.*, 112 N. C., p 34.

In the present case there was evidence tending to show that, under a special statute of the Legislature, passed for the purpose, the taxes were due and properly assessed; that same were imposed and that there was

a lot of land within the city subject to a lien therefor. This being true. we see no reason why plaintiff should not be allowed to enforce collection by suit, not only under the general principles recognized and established in these decisions, but under provision of Revisal, sec. 2866, expressly authorizing a suit of this character, in favor of State, county or other municipality, and also of private corporations and individuals holding certificates of purchase, etc.

There is nothing in the case of *Berry v. Davis*, 158 N. C., 170, that in any way militates against this position. In that case it was held that a sheriff or tax collector, having the tax list in his hands for collection, giving him present power to seize and sell property, could not bring claim and delivery for property before levy thereon; that, unless expressly authorized by statute, an executive officer must proceed to enforce collection by the ordinary methods of levy and sale.

Whether, in case of real estate, section 2866 should be construed and held to authorize a suit of foreclosure by a sheriff or tax collector, in the first instance, it is not necessary now to decide. It could well be shown that the distinction between suits by the State and municipalities, on the one hand, and tax collectors or executive officers, on the other, a distinction fully recognized in *Berry's case, supra,* and in *S. v. Ga. Co., supra,* is based upon substantial reason, but the point is not presented in this appeal. The question is one entirely for legislative consideration, and the suit, as heretofore shown, is by the municipality, proceeding under express legislative sanction.

There was error in sustaining the demurrer, and this will be certified, that the trial of the cause may be proceeded with.

Reversed.

Cited: Cherokee v. McClelland, 179 N. C. 130 (2f); *Com. v. Epley,* 190 N. C. 673, 674 (2pf); *Wilkes County v. Forrester,* 204 N. C. 167 (1l); *Rigsbee v. Brogden,* 209 N. C. 514 (2p); *Wilkinson v. Boomer,* 217 N. C. 221 (2pl); *Raleigh v. Bank,* 223 N. C. 306 (1j, 2j).

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McKIMMON, CURRIE & CO. v. FANNIE CAULK.

(Filed 10 November, 1915.)

1. Husband and Wife—Lands—Right of Survivorship—Partition—Judgment—Divorce—Second Partition—Reformation of Deed—Estoppel.

Where a husband and wife are seized of lands by entireties with the right of survivorship, and bring proceedings for partition against another, who owns the tract in common with them, and the question of title

has not been at issue either as between the husband and wife or between them and the third person, it is *Held*, that thereafter, upon the granting of an absolute divorce, the judgment in the partition proceedings will not estop the wife, in another proceeding for partition brought by her husband's grantor, from asserting her right to have the deed made to her and her husband corrected for the mistake of the draftsman in not making the conveyance to her alone, and thus raising the issue of title in the second proceeding. *Weston v. Lumber Co.*, 162 N. C., 179, cited and applied.

2. Limitation of Actions—Reformation of Deeds—Discovery of Mistake.

In this action, involving title to land, it is *Held*, under the plea of the statute of limitations, that the question was one of fact, that is, whether the defendant discovered the mistake in the deed more than three years prior to the institution of the action, and no error was found in the instruction by the trial judge upon the evidence introduced.

3. Evidence—Limitation of Actions—Possession — Declaration — Rule of Competency.

Where land is sought to be held by adverse possession, in an action to recover it, it is competent to introduce in evidence declarations of one in possession which characterized or explained his possession, when such is relied upon, when they are in disparagement of his possession, or against his interests, and not merely narrative of a past occurrence; and applying this rule to the evidence in this case, the evidence is held to be incompetent.

APPEAL by plaintiff from *Allen, J.*, at the March Term, 1915, of ROBESON.

Proceeding for the partition of thirty-five acres of land, the plaintiff alleging that it is the owner of a one-half undivided interest therein, and that the defendant Fannie Caulk is the owner of the other one-half interest in said land.

Prior to 1878 George Dial was the owner of sixty acres of land, and in that year this land was sold under execution and was bought by Sinclair Lowrie, to whom a deed for the land was regularly executed.

In March, 1890, Sinclair Lowrie conveyed said land to "Sarah Dial for her lifetime, then thirty-five acres of the upper end goes to Wesley Caulk and Fannie, his wife, and twenty-five acres, the lower end, goes to John Dial." Thereafter Wesley Caulk and Fannie Caulk, his wife, as plaintiffs, instituted a proceeding against John Dial for the partition of said sixty acres of land, alleging that they were tenants in common and that the said Wesley Caulk and Fannie were entitled together to have thirty-five acres of the upper part of the tract of land allotted to them and that John Dial was entitled to have twenty-five (55) acres upon the lower part allotted to him, and in said proceeding allotment was made accordingly, the thirty-five acres in controversy in this action being allotted to Wesley Caulk and his wife, Fannie Caulk.

Thereafter, in an action duly instituted, a decree of absolute divorce was entered severing the bonds of matrimony existing between the said Wesley Caulk and Fannie Caulk.

Thereafter the said Wesley Caulk conveyed his interest in the thirty-five-acre tract of land to the plaintiff, and this proceeding for partition was then instituted.

The defendant, Fannie Caulk, denies the right of the plaintiff to partition, alleging in her answer that the name of Wesley Caulk was inserted in the deed executed by Stephen Lowrie by mistake, and she asks to have the deed corrected.

The plaintiff replied that the defendant is estopped by the decree in the proceeding for partition wherein she and her husband, Wesley Caulk, were plaintiffs and John Dial defendant, and further pleaded the statute of limitations to the right of the defendant to have the deed corrected.

The jury returned the following verdict:

1. Is the defendant estopped as alleged? Answer: No.
2. Is the defense of the defendant barred by the statute of limitations? Answer: No.
3. Was the name of Wesley Caulk inserted in the Sinclair Lowrie deed by the mistake of the draftsman? Answer: Yes.
4. Did the plaintiff have notice of the defendant's claim of mistake when it took the deed from Wesley Caulk? Answer: Yes.
5. Is the plaintiff an innocent purchaser for value? Answer: No.
6. Is the plaintiff the owner of one-half undivided interest in the lands in controversy? Answer: No.

Judgment was rendered in favor of the defendant and the plaintiff excepted and appealed.

B. F. McLean and McLean & McKinnon for plaintiff.

McNeill & McNeill and McLean, Varser & McLean for defendant.

ALLEN, J. When this action was heard on the former appeal (167 N. C., 411) it was held that the deed of Sinclair Lowrie vested an estate by entireties in Wesley Caulk and his wife, Fannie, with the right of survivorship, in the land in controversy, but that the decree of absolute divorce severed the relationship and the estate, and that thereafter they became tenants in common, and the judgment of the Superior Court dismissing the action, then before the court for review, was reversed and a new trial ordered.

(56) When the action was again tried, the defendant relied upon the plea that the name of Wesley Caulk was inserted in the deed of Sinclair Lowrie by mistake and asked that the deed be corrected, and the

plaintiff replied that she was estopped to set up this plea by reason of the decree in a proceeding for partition wherein Wesley Caulk and wife were plaintiffs and John Dial was defendant, in which it was adjudged that the plaintiffs therein were the owners of the thirty-five acres of land in controversy, which was set apart to them in that proceeding.

His Honor held that the defendant was not estopped, and the plaintiff excepted.

The primary purpose of partition proceedings is to sever the unity of possession, but the parties may put the title in issue, and when they do so, and the title is adjudicated, the judgment is conclusive and binding. *Buchanan v. Harrington,* 152 N. C., 334. The question is discussed and the authorities collected in *Weston v. Lumber Co.,* 162 N. C., 179.

It was also pointed out in the last case, relying upon the authority of *Cromwell v. County of Sac,* 94 U. S., 352, that the statement frequently found in the reported cases that judgments not only estop as to the matters actually litigated, but also as to those that might be litigated, is sound as applied to actions based on the same claim or demand, and that in other cases the correct rule is the one laid down in *Coltraine v. Laughlin,* 157 N. C., 287, that "It (the judgment) estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the techincal 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. *Gilliam v. Edmonson,* 154 N. C., 127; *Tyler v. Capeheart,* 125 N. C., 64; *Tuttle v. Harrell,* 85 N. C., 456; *Fayerweather v. Ritch,* 195 U. S., 277; *Aurora City, v. West,* 74 U. S., 103; *Chamberlain v. Gaillard,* 26 Ala., 504; 23 Cyc., pp. 1502-4-6."

Applying these principles, it is clear that the judgment in the partition proceeding does not estop the defendant, as the claim and demand in the two actions is not the same and the right of the defendant to have the deed corrected has never before been litigated or considered.

In the partition proceeding Wesley Caulk and Fannie Caulk, his wife, were the plaintiffs on one side, and John Dial on the other. The only question in controversy was as to the rights of the plaintiffs as against the defendant to have thirty-five acres of land set apart to them, and no question was raised as to the rights of the plaintiffs as between themselves, and if it should be held that the defendant is estopped, it must be when her right which she is now urging has never been passed upon, and when it was not within the scope of the pleadings in the action in which the decree was rendered, which is relied on as an estoppel.

Mr. Freeman, in his valuable work on Judgments, says: "Parties to a judgment are not bound by it in a subsequent con- (57)

troversy between each other unless they were adversary parties in the original action." Freeman on Judgments, Vol. 1, sec. 158.

In *Baugert v. Blades,* 117 N. C., 221, the Court says, that "The rule seems to be that the judgment against several defendants determines none of the rights of the defendants among themselves, but only the existence of the demand," and there is no reason why the same rule should not prevail as between plaintiffs. Of course if matters are in issue between plaintiffs or between defendants, and are adjudicated, the judgment estops. We are therefore of opinion that his Honor correctly held that the defendant was not estopped.

The plea of the statute of limitations resolved itself into a question of fact, and that is, whether the defendant discovered the mistake in the deed more than three years prior to the institution of the action, and this was submitted to the jury under proper instructions.

James Dial was introduced as a witness for the defendant and, among other things, testified as follows:

Q. Do you know anything about George Dial directing Sinclair Lowrie to make this deed to Fannie and her brother and mother for this land? A. I think so.

Q. Go ahead and tell what you know about that. A. He wanted to make it to somebody who would look after him in his old age. He first preferred to make it to me, provided I would live on it. I refused to do that. He said then, "Suppose we have Sinclair make it to Sarah and her two children; they would take care of me," and I told him all right, to go ahead and do so.

Q. Did you afterwards hear him say that he had Sinclair to make the deed this way? A. Yes, sir.

Q. Did you hear Sinclair Lowrie say anything about the deed? A. Yes, sir. He said he made it to Sarah and her two children. I don't know exactly how old my father was at the time of his death; 80 or 85 years. Sarah and them two children, Fannie and John, were the ones that seen after him."

This evidence was objected to by the plaintiff, and exception was duly taken to its admission, in overruling which there was error.

It is competent to introduce declarations of one in possession of land which characterize or explain his possession or is in disparagement of his title, or against his interest, if not merely narrative of a past occurrence (*Roberts v. Roberts,* 82 N. C., 29; *Shaffer v. Gaynor,* 117 N. C., 24; *Norcum v. Savage,* 140 N. C., 472); but this evidence does not come within any of the exceptions to the general rule which excludes hearsay evidence.

(58) It is evidence of declarations in the interest of the declarant; it did not tend to explain his possession and was in part, at least,

narrative of something that had occurred before. It was important and material upon the principal question in controversy as to whether there was a mistake in the deed of Sinclair Lowrie, because when properly understood it means that George Dial said he had told Sinclair Lowrie to make the deed to Sarah and her two children, thereby excluding Wesley Caulk, and that Lowrie had told him that he had done so.

The evidence falls within the principle of the evidence which was condemned in *Roberts v. Roberts*, 82 N. C., 32, where the Court says: "The acts and declarations accompanying possession in disparagement of the claimant's title or otherwise qualifying his possession are received as part of the *res gestæ*. But when declarations, offered in evidence, are merely *narrative of a past* occurrence, they cannot be received as proof of the existence of such occurrence. 1 Greenl. Ev., paragraphs 109, 110. The conduct and declarations of the testator were offered upon an issue relating solely *to the contents of a lost or destroyed deed,* and in enlargement of his own estate, and to this end in proof of a pre-existing fact not connected with or explanatory of his possession."

For the error in the reception of this evidence there must be a

New trial.

Cited: Northcott v. Northcott, 175 N. C. 151 (1b); *Gray v. Mewborn,* 194 N. C. 350 (1f); *Crawford v. Crawford,* 214 N. C. 617, 618 (1b); *Gibbs v. Higgins,* 215 N. C. 204 (1b); *Clinard v. Kernersville,* 217 N. C. 688 (1p); *Bailey v. Hayman,* 222 N. C. 59 (1p); *Huffman v. Pearson,* 222 N. C. 199 (1f); *Craver v. Spaugh,* 227 N. C. 131 (1b).

IN RE WILL OF JANE S. RAWLINGS.

(Filed 10 November, 1915.)

1. Wills—Caveat—Separate Issues — Judgments — Sufficiency as to One Issue—Appeal and Error.

In this action to caveat a will, involving the questions of undue influence upon and the mental capacity of the testator at the time, the issues submitting separately these two phases with a third issue as to whether the paper-writing and every part thereof was the last will and testament of the deceased, are approved; and the negative answer of the jury to the second issue being free from error and sufficient for judgment in caveator's favor, errors of law committed by the court on the other two issues become immaterial.

2. Evidence—Depositions—Notice—Persons Named "and Others."

Where depositions are taken upon notice to the adverse party to the proceedings that certain named persons "and others" will be examined, the testimony of other witnesses than those specified may be read upon the trial, and exception on the ground that they were not named in the notice will not be sustained.

3. Wills—Mental Capacity—Evidence—Nonexpert Witnesses.

Upon the issue of the mental capacity of the testator at the time he executed his will, the evidence necessarily takes a wide range, and the courts are liberal in allowing persons who were acquainted with the
(59) testator to give in evidence their opinion thereof; and witnesses who are not subscribing witnesses to the will are competent, though they are not expert in such matters, to testify to the mental condition of the testator if they have had adequate opportunity for observation and forming a judgment.

4. Wills—Mental Capacity—Evidence—Married Insane Person—Appeal and Error—Harmless Error.

Upon the issue of the mental capacity of a testatrix in executing a will, evidence that she had theretofore married a man who had several times been an inmate of an insane asylum was harmless, and not prejudicial to the caveator. But were it otherwise, *semble*, it may be considered, with the other testimony in this case, as being some evidence of unsoundness of mind.

5. Wills—Mental Capacity—Trials—Evidence—Questions for Jury.

Testimony of witnesses having had opportunity to observe the testatrix whose will is attacked for her mental incapacity at the time of its execution, that she was easily influenced, had tried to drown herself; that she was like a child six or seven years of age, her mind was like an imbecile; that she did not have, in their opinion, sufficient mental capacity to make a will, or know the kind and value of her property, etc., is held abundantly sufficient to sustain a judgment on that issue in the caveator's favor.

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

In this action to caveat a will, the introduction of the personal tax returns of the propounder, made two years after the death of the testator, is held to be harmless; and the introduction in evidence of conveyances, deeds in trust, etc., made by the testator to the propounder was for the purpose of showing confidential relations arising under the issue as to undue influence, and not affecting the judgment sustained under the issue as to mental capacity of the testator.

7. Instructions—Wills—Mental Capacity—Trials—Burden of Proof—Appeal and Error—Harmless Error.

Where the charge of the court to the jury, in an action to caveat a will, construed as a whole, clearly, unmistakably and properly shifts the burden of proof on the caveator to show the mental incapacity of the

testator, exception to an isolated portion thereof, which standing alone would be erroneous, will not be sustained.

APPEAL by propounder from *Justice, J.*, at the June Term, 1915, of ROCKINGHAM.

Issue of *desisavit vel non*, raised by a caveat to the will of Jane S. Rawlings, tried upon these issues submitted without objection:

1. Was the execution of the paper-writing purporting to be the last will and testament of Jane Spaulding Rawlings procured by the fraud and undue influence of John D. Huffines? Answer: Yes.

2. Did Jane Spaulding Rawlings, at the time of the execution of said paper-writing, to wit, 3 November, 1911, have sufficient mental capacity to execute the same? Answer: No.

3. Is the paper-writing propounded, and every part thereof, the last will and testament of Jane Spaulding Rawlings? Answer: No.

From the judgment rendered, the propounder, Huffines, appealed. (60)

C. O. McMichael, Manly, Hendren & Womble for the propounder.

H. R. Scott, King & Kimball for the caveators.

BROWN, J. The wise course pursued by his Honor in dividing the issues relating to undue influence and mental capacity, instead of submitting the one issue of *devisavit vel non*, has rendered it unnecessary to order a new trial in this case, and has enabled us to affirm a judgment which, tested by the great weight of the evidence in the record, ought to be affirmed.

The evidence discloses that the testatrix, Jane Spaulding, was wholly illiterate and never able to either read or write, and not able to manage her own small estate. In 1906 she met J. D. Huffines, the propounder, a real estate dealer in Reidsville, who soon became her agent and manager of her affairs. That he was her business manager and trusted agent is proven by the language of the will, itself, an instrument written at the propounder's instance and by his confidential attorney, and which devised to the propounder practically the entire estate.

There is most abundant evidence to justify the verdict of the jury on the first issue of undue influence, as well as upon the second issue, relating solely to mental capacity; but it is unnecessary to discuss the many assignments of error bearing on the first issue, as it is well settled that where the finding upon one issue is sufficient to justify the judgment, a new trial will not be granted.

We will, therefore, confine our review of the case to those assignments of error bearing upon the second issue, and which are noticed in the

propounder's brief. It is the rule of this Court to consider only those assignments that are set out in the brief. There are thirty-seven assignments of error in the record, but only a few relate to the second issue, and only a few of these are noticed in the propounder's brief.

It is insisted that his Honor erred in admitting the depositions of the witnesses Loman A. Ball and Agnes Smith because their names are not inserted in the notice to take depositions. The notice is in the usual form and directs the commissioner to take the depositions of John Brannen and several other witnesses by name "and others." There is no merit in the assignment. The point has been expressly decided against the propounder so long ago as *McDougald v. Smith,* 33 N. C., 576. Discussing the case, the Court said:

"In this case, he can rightfully make no such allegation, but was apprised that the examination would not be confined to the witnesses named. It was his duty to attend, or be properly represented, that he might take care of his interest. The act of our Legislature points out no form in which the notices shall be drawn. It simply directs that notice shall be given the adverse party of the time and place when the
(61) 'commission shall be executed.' So far as the practice under it can be considered a construction of it, the notice complained of is proper. We see no provision in the act forbidding it, and no evil or danger resulting from it. The defendant, however, further complains on this point that the persons named in the notice were not examined. We know of no law requiring a party to examine all or any of the witnesses named in the notice. As well might it be required of a party to examine all the witnesses he summons on a trial before a jury, and who are in attendance."

See, also, *Jeffords v. Waterworks Co.,* 157 N. C., 13.

His Honor permitted the following questions to be asked and answered:

(1) In your judgment how was her mind when you visited her in North Carolina compared with her mind when you and she were at home together?

(2) In your opinion do you think she was capable of disposing of her property by will and understanding the consequences and effect of her so doing?

(3) In your opinion state whether or not she had sufficient mental capacity to know the kind and nature and value of her property, or to make disposition of it by sale and know what she was about?

These questions are permissible, for it is well settled that a non-expert witness, although not a subscribing witness and not present at the execution of the will, may testify to the mental condition of the testatrix, if he has had adequate opportunities for observation and forming a judge. Page on Wills, section 390.

In cases of this character, the evidence of necessity takes a wide range and the courts are liberal in allowing persons who are acquainted with the testatrix to testify as to their opinion of her sanity. The form of these questions is in substantial accord with the adjudications of this Court. *McLeary v. Norment,* 84 N. C., 235; *Crenshaw v. Johnson,* 120 N. C., 274; *Bond v. Manufacturing Co.,* 140 N. C., 381; *Bost v. Bost,* 87 N. C., 477; *Morris v. Osborne,* 104 N. C., 609 at 612; *Clary v. Clary,* 24 N. C., 78; *S. v. Ketchey,* 70 N. C., 621.

The objection that his Honor permitted a witness to testify that the testatrix's second husband, prior to the time she married him, had been in an insane asylum two or three times is immaterial and harmless. It seems to us that it had no bearing upon the issue one way or the other. It might, however, be regarded as some evidence of the mental condition of the testatrix if it is shown that she married an inmate of an insane asylum. None of these assignments are mentioned in the propounder's brief. Nevertheless we have deemed it proper to notice them, as they have a bearing upon the second issue.

Notwithstanding the contention of the propounder to the con- (62) trary, we think, upon an examination of the record in this case, that the evidence of a lack of mental capacity upon the part of the testatrix is very strong and it is difficult to conceive how the jury could have come to any other conclusion than they did reach in answering the second issue.

A large number of witnesses, who were neighbors of the alleged testatrix from the time of her removal from Ohio to Ruffin, N. C., in 1873, and until her removal again to Reidsville in 1906, had been examined. All of them have testified that they have known her a large part of her life; that she was a person easily influenced by others; that she had tried to drown herself; and that in their opinion she did not have sufficient mental capacity to make a will or to transact business. Some of the witnesses say she would have to be entertained like a child of six or seven years of age; that her mind was very weak and imbecile from birth. One witness, a physician, testified that the testatrix did not have sufficient mental capacity to know the kind and nature and value of her property or to make a disposition of it by will, and that she generally did not know what she was about. It is useless to discuss this feature of the case any further. Any one reading the record must be impressed with the strength of the testimony offered by the caveators bearing upon that issue.

It is objected that his Honor permitted the introduction of the personal tax returns of the propounder, made two years after the death of Mrs. Rawlings. We fail to see how this is material, and we regard it as perfectly harmless. The assignments of error relating to the introduc-

tion of a number of deeds, conveyances and deeds in trust, made by the testatrix to the propounder and his wife, were evidently offered for the purpose of showing that Huffines was the business agent of the testatrix (a fact which is proven by the will, itself) and is evidence upon the first issue. They have no bearing whatever upon the second issue.

The objection to his Honor's charge that he required the propounder to show that the testatrix knew and approved of the contents of the will is immaterial because the court confined it strictly to the first issue. The same can be said of the other exceptions to the charge except one which is embraced in Assignment of Error No. 31. His Honor, referring to the second issue, said to the jury: "If they have failed to so satisfy you, and the propounder has satisfied you that she did have sufficient mental capacity, you will answer the second issue 'yes'." This is but an isolated extract from the charge of the court upon that issue. His Honor's instructions upon that issue were very full, clear and explicit, and strictly in accord with the repeated decisions of this Court.

(63) Upon the quantum of intellect necessary to execute a will or a deed, the instructions given are very favorable to the propounder. His Honor said: "It does not require the highest degree of intelligence to be able to execute a will or deed, nor does it require a high degree of intelligence to do it. It is not a question of illiteracy—people who can neither read nor write, if they are otherwise qualified mentally, have the same right and power to make a will that a man who knows all the languages does. A man who is utterly illiterate, if a man of good sense and knows what he wants and what he is about and does what he intends to do, has as much right to make a will or deed as the most thoroughly educated person in all the land.

"Now, how much capacity does it require? We find it does not require education. That is not the question—but how much mental capacity does it require? The court has said that it does not require the highest degree of intelligence or mental capacity, nor does it require a high degree. But if the party making the will or deed has sufficient understanding to know what she is about and to understand what property she has and understand to whom she desires to convey it or devise or bequeath it, and the extent and consequence of her act, and what property she is conveying, then she would have sufficient mental capacity to make a will."

In concluding his remarks upon this second issue, the court said:

"The question here is, did she at the time of the execution of that will have sufficient mental capacity to understand what property she had, to whom she desired to convey it in the will, and the nature and character of the tranaction and the result and consequence of it? If she did, then she had sufficient capacity to make the will. The burden

of that is upon the caveators to satisfy you that she did not have sufficient mental capacity to make the will. The law requires them to prove it, and they contend they have proved she did not have it. If they have satisfied you of that, then you must answer the second issue 'No.' If they have failed to so satisfy you, and the propounder has satisfied you that she did have sufficient capacity, you will answer the second issue 'Yes'."

It is manifest that his Honor did not put the burden of proving the negative of the second issue upon the propounder. He distinctly told the jury that the burden of proving that issue is upon the caveators and that they must satisfy the jury that the testatrix did not have sufficient mental capacity to make the will; that the law requires the caveators to prove it; and they contend that they have proved that she did not have such capacity. The concluding sentence of his Honor was an inadvertence of speech which could not possibly have misled the jury. The entire instruction upon the burden of proof was too plain and unequivocal for the jury to have misunderstood it.

The 35th assignment of error is to the part of the charge of (64) the court to the effect that the will of the testatrix does not purport to bear her own genuine signature, but simply her cross-mark. That portion of the charge does not bear at all upon the second issue, and as his Honor expressly told the jury to confine it to the third issue, we do not deem it necessary to discuss it.

Upon a review of the whole record, we find.

No error.

Cited: Hyatt v. Hyatt, 187 N. C. 115 (3l); *In re Creecy,* 190 N. C. 303 (g); *In re Craig,* 192 N. C. 657 (3); *In re Will of Efird,* 195 N. C. 84 (1g); *Parker Co. v. Bank,* 200 N. C. 441 (1l); *In re Will of Stallcup,* 202 N. C. 7 (1g, 7b); *Winborne v. Lloyd,* 209 N. C. 487 (1f); *In re Will of Lomax,* 224 N. C. 461 (3l); *In re Will of Atkinson,* 225 N. C. 530 (7b); *In re Will of West,* 227 N. C. 210 (1g, 7b).

LUCINDA E. D. PEACE v. JANIS L. EDWARDS AND OTHERS.

(Filed 10 November, 1915.)

1. Wills—Disposition of Property—Statutory Regulations.

The right to dispose of property by will is not a natural right, but one conferred and regulated by statute.

2. Same—Signature—Date—Subscribed.

The testator's signature to the will is required by our statute, Revisal, sec. 3113, though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting, appears in the body thereof, has the same legal effect as those bearing dates and subscribed by the testator.

3. Same—Several Wills—Conflicting Disposition of Property—Intestacy.

Where the decedent has left several paper-writings purporting to be his last will, containing the opening declaration, as to each, that the testator made the same as his "last will and testament," but only one of them bears date and his name subscribed thereto, and each of them making a disposition of his property different from the other, the undated and unsubscribed wills have the same legal effect as the one dated and subscribed, though the testator had endorsed under his signature, thereon, the words "last will"; and in the absence of proof as to which of the wills was the last one, the legal effect is intestacy.

WALKER, J., dissenting; HOKE, J., concurs in the dissenting opinion.

APPEAL by plaintiff from *Cooke, J.*, at the April Term, 1915, of GRANVILLE.

Caveat to a paper-writing offered for probate as the will of Josephus A. Peace, who died 9 March, 1915, aged eighty-eight years, the owner of eight hundred acres of land and certain personal property.

The deceased never married. After his death four paper-writings were found folded together in a seed catalogue in his desk, and all were in the handwriting of the deceased. Each of these four papers begins as follows. "I, Josephus A. Peace, of the county of Granville and State of North Carolina, do make, publish and declare this to be my last will and testament." Three of these papers are without date and are
(65) not subscribed by the deceased, and the fourth is subscribed and bears date, 4 May, 1910, and under the name of the deceased are the words "last will."

No evidence was offered as to the time of writing or signing the three papers that are without date.

At the conclusion of the evidence his Honor instructed the jury as follows: "That four paper-writings of a testamentary character being before the jury, all of them being, as appears from the testimony of the propounders, in the handwriting of the deceased, J. A. Peace, and all found folded together, making four different dispositions of the property of the deceased, three of them being without date and one dated, and no testimony being offered to show which was in fact the last will of the deceased, the said writings are mutually destructive of each other, and it cannot be determined which is the last will of the deceased, and

the jury, if they believe the testimony, are instructed to answer the issue 'No'." The propounders excepted.

There was a verdict and judgment in favor of the caveators and the propounders appealed.

T. T. Hicks and Hicks & Stem for caveators.

B. K. Lassiter, B. S. Royster, J. C. Kittrell, R. G. Kittrell and G. M. Pitman for propounders.

ALLEN, J. The right to dispose of property by will is not a natural right. It is one conferred and regulated by statute. *Pullen v. Comrs.*, 66 N. C., 363. In this case *Rodman, J.*, says: "Property itself, as well as the succession to it, is the creature of positive law. The legislative power declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons whom it defines heirs; and on the failure of such it takes the property to the State as an escheat. The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government, and which no government can rightfully impair."

The only case holding to the contrary we have found in *Nunnemacher v. State*, 129 Wis., 190, which is also reported in 9 A. and E. Anno. Cases, 711, where there is a very comprehensive note collecting authorities from twenty-three states and from the Supreme Court of the United States, supporting the *Pullen case*, the editor concluding that "The doctrine of the reported case, that there is a natural right, protected by the Constitution, to take property by inheritance, devise, or bequest, is entirely new to the law. The doctrine which has long been regarded as not open to question is that such right is entirely dependent upon, and subject to modification or abridgment by, statutory law."

We must then examine the statutes of our State to see what for- (66) malities are necessary to the execution of a valid will, and when we do so we find that there is no requirement that a will shall be dated or subscribed (Rev., 3113), and in the absence of a statute saying that a will must be dated the general doctrine is that a will without date is valid. "Where the statute does not require a date an undated will is valid." 30 A. and E. Ency., 591. "The date not being a material part of a will, a will may therefore be held to be valid, although it has no date or a wrong one, unless a statute provides otherwise." 40 Cyc., 1098. See also to the same effect 14 Ency. Ev., 434; 1 Underhill on Wills, p. 247.

The statute does, however, require the will to be signed, but it is well settled that if the name of the testator appears in his handwriting in the body of the will this is a signing within the meaning of the statute.

Hall v. Misenheimer, 137 N. C., 185; *Richards v. Lumber Co.,* 158 N. C., 56; *Boger v. Lumber Co.,* 165 N. C., 559; *Burriss v. Starr,* 165 N. C., 660.

In the last case the Court quotes with approval from *Boger v. L. Co.* and *Richards v. L. Co.,* as follows: "The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity, in reference to the first class, that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. In *Richards v. Lumber Co.,* 158 N. C., 56, dealing with this question, the Court said: 'It is well settled in this State that when a signature is essential to the validity of an instrument, it is not necessary that the signature appear at the end unless the statute uses the word "subscribe." *Devereux v. McMahon,* 108 N. C., 134. This has always been ruled in this State in regard to wills, as to which the signature may appear anywhere. If this is true of a "signature," it must also be true of the word "countersign." It has been often held that the place of signing is a matter of taste. *Adams v. Field,* 21 Vermont, 264; 36 Cyc., 441.' "

It follows, therefore, that as a will without date, and which is not subscribed, is valid, and as it is a signing within the meaning of the statute if the name of the testator is in the body of the will in his handwriting, that the three paper-writings which are without date and not subscribed have the same legal effect as the one which bears date and is subscribed, as each has the declaration in the handwriting of the testator that "I, Josephus A. Peace, of the county of Granville and State of North Carolina, do make, publish, and declare this to be my last will and testament."

We attach no significance to the words "last will" under the signature of the testator, because each paper says it is his last will.

(67) We have, then, four paper-writings, found folded together among the papers of the deceased, each executed as required by statute, and each a valid exercise of testamentary capacity, and they are not in harmony so they may be upheld as one will, but are inconsistent and mutually destructive of each other, and there is no evidence, direct or circumstantial, and nothing on the face of the papers to prove which is the latest expression of the intent of the deceased. Under these circumstances neither can stand, and it must be held that the deceased died intestate.

"Where two wills containing inconsistent dispositions bear the same date, evidence is admissible to show which was executed last. If there

is no extrinsic evidence to be had neither instrument will be admitted to probate." 30 A. and E. Ency., 627; 40 Cyc., 1176.

"Where two or more wills, or a will and a codicil, properly executed, but undated, or of the same date, are discovered at the death of the testator, difficulty will naturally be discovered in ascertaining which speaks his final intention. . . . If it is impossible for the Court, after considering all available extrinsic evidence, and an attentive perusal and comparison of the writings, to determine which is the later or latest, all of necessity will be void so far at least as they are irreconcilably inconsistent." 1 Underhill on Wills, 351.

We, therefore, conclude that there is no error in the instruction to the jury.

Affirmed.

WALKER, J., dissenting: I cannot agree to the result in this case. The four papers were found together in one package, three undated and unsigned and the other undated, but subscribed by the testator, and underneath his signature are the words "last will." The Court says there is no evidence that this paper-writing was his last will. I am of a contrary opinion. The testator *evidently* thought that an unsubscribed paper-writing was not a will and that it required his signature at the end of it to make it so, and, therefore, he signed at the end the one he intended to operate as his will, and, to avoid any possible miscarriage of his purpose, he not only signed it, but inserted under the signature the words "last will," so as to clearly indicate that it was so intended. If this is not so, why did he not also sign the others and write something on them (or one of them), in order to indicate his purpose that it should be his last will? He regarded the others as incomplete, and when he had finally decided as to how he would dispose of his property, he wrote this paper, signed it and added the words "last will" as a certain and sure index to his intention. Why did he sign at all, if he thought subscription was not an essential requisite of a will? He had signed the other papers, in a technical sense, but he manifestly did not know it, not being a lawyer, but it appears that he had been a man of sense and judgment, and having written the last one, he sub- (68) scribed it and so distinguished it from the others, as the last expression of his desires, in order to make his meaning and his wishes in regard to the disposition of his property perfectly plain. It is for the jury, and not for this Court, to say what he really meant, and whether this paper is in fact his last will and testament. He had, no doubt, good and valid reason for the changes he made, but they were satisfactory to him, whether wise and discreet or not, and that is enough, for it is *his*

will and not *ours,* and he had the right to do with his own as he chose, provided he did not contravene any law, and this he has not done.

JUSTICE HOKE concurs in this dissenting opinion.

Cited: Corp. Com. v. Wilkinson, 201 N. C. 348 (2l); *Paul v. Davenport,* 217 N. C. 157 (1f, 2b); *In re Will of Goodman,* 229 N. C. 447 (2f).

MARY A. NICHOLSON v. SOUTHERN EXPRESS COMPANY.

(Filed 10 November, 1915.)

1. Common Carriers—Places of Business—Invitation, Express or Implied—Safety of Patrons.

Common carriers and others who induce the public to come into their places of business by invitation, express or implied, owe to them the duty of using reasonable care to keep the premises in a safe condition, so that their patrons may not unnecessarily be exposed to danger.

2. Same—Express Companies—Negligence—Trials—Questions for Jury.

Where upon notice a patron of an express company, an elderly lady, has gone to the company's office to receive an express package, and in her action to recover damages there is evidence tending to show that to repair the floors therein the flooring had been removed in front of the door, and a bystander helped her across, but being detained, the sills had also been removed when she desired to leave, and the same person who had assisted her, threw down a plank for her to cross, which she attempted to do, but went back, observing that the plank would break with her, within the sight and hearing of the agent and his clerk, about five feet off, but who paid no attention to her; whereupon she, being compelled to go home, again made the attempt to cross, but her foot slipped and she fell to her injury: *Held,* evidence sufficient upon the question of defendant's actionable negligence to take the case to the jury.

APPEAL by plaintiff from *Cooke, J.,* at the February Term, 1915, of GRANVILLE.

Civil action. At the conclusion of the evidence his Honor granted a motion to nonsuit, and the plaintiff appealed.

A. W. Graham and A. W. Graham, Jr., for the plaintiff.

B. S. Royster for the defendant.

BROWN, J. The plaintiff sues to recover damages from the defendant for an injury sustained in the office of the defendant in Oxford. The

testimony tends to prove that the plaintiff, an elderly lady, (69) upon notice from the defendant, called at its office for the purpose of receiving a package consigned to her through the defendant. Upon entering the office door, she found that the floor extending from the street back into the office for a space of six feet long and four feet wide had been torn up, exposing the sleepers upon which the floor had rested. The defendant was repairing the office floor by taking up some of the sleepers which were rotten. The plaintiff was assisted across the sleepers to the counter, behind which the defendant's agent stood, by the hand of a by-stander. The agent detained her some time before delivering the package.

During this time the sleepers had been entirely cut away by the workmen and the pieces thrown down into the hole in the floor. When the plaintiff had received the package and turned to go out, the same person who assisted her in threw down a thin piece of plank across the hole in the floor, across which the plaintiff started to walk. Fearing that she would break through, she got back on the solid floor, remarking: "I cannot walk that plank; it will break through with me." This was said in the hearing of the agent and his clerk, who at the time were playing with a puppy within five feet of the plaintiff. They both saw the hole in the floor and the plaintiff's predicament, but offered her no help.

The plaintiff, seeing that no one would help her, and being compelled to go home, stepped down into the hole and attempted to get across it so as to reach the street. Her foot slipped, something causing her to stumble, and she was thrown forward with great force and was badly bruised and injured.

We think this evidence, if taken to be true, makes out a clear lack of duty to the plaintiff upon the part of the defendant's agent. It is well settled that not only common carriers, including express companies, but merchants and others who induce the public to come to their places of business by invitation, express or implied, owe to them the duty of using reasonable care to keep the premises in a safe condition so that their patrons may not be unnecessarily exposed to danger. 29 Cyc., 453; 2 Shearman and Redfield on Negligence, page 106.

Upon the state of facts presented in this record, the plaintiff cannot be said to be guilty of contributory negligence upon her own evidence. On the contrary, it may well be argued to the jury that she was in a predicament brought about by the defendant's negligence and that she had to go home and took the only way out in order to reach the street. In doing so, to say the least, it is a question for the jury if she exercised such reasonable care as a person of ordinary prudence would be expected

to exercise under the circumstances in which she was placed. *Darden v. Plymouth,* 166 N. C., 492.

There must be a new trial.

Reversed.

Cited: Porter v. Niven, 221 N. C. 222 (2d).

(70)

JOHN B. KLUNK v. BLUE PEARL GRANITE COMPANY.

(Filed 10 November, 1915.)

1. Master and Servant—Proper Tools—Defects—Ordinary Care—Simple Tools.

The master is required by the exercise of proper care to furnish the servant with suitable tools and appliances, to be used by him in the performance of his work, which he cannot delegate to another and avoid liability for an injury proximately resulting from a defect which should reasonably have been observed; and this principle applies not only to instances of complicated machinery but to simple tools, when it is properly applied.

2. Same—Negligence—Proximate Cause—Trials—Evidence—Nonsuit.

In an action to recover damages of a master for his failure to supply the servant with proper tools with which the latter performed his services, there was evidence in plaintiff's behalf tending to show that the servant was required to cut stone with a steel tool called a pitching tool, made by another employee of the defendant from steel bars of inferior grade after they had been used in defendant's machine, and more likely to burst owing to its inferiority when stricken a heavy blow, and that in cutting the stone it was necessary for the servant to place the edge or bit part upon the stone and strike the other end heavy blows with a hammer; the pitching tool burst, causing a splinter of steel to fly off and injure his eye; that the master's attention had previously been called to the inferiority of the steel from which the pitching tools were made; that the tool had been worn to a length of four inches from an original and ordinary length of six or seven inches; that the defective steel was observable while being made into the tool, but not in its use: *Held,* sufficient for the determination of the jury upon the question of defendant's actionable negligence, proximate cause, and the master's exercise of reasonable care in not discovering the defect.

APPEAL by plaintiff from *Justice, J.,* at the Spring Term, 1915, of FORSYTH.

Action to recover damages for personal injury, caused, as the plaintiff alleges, by reason of the failure of the defendant, in whose employment

the plaintiff was at work, to furnish him a reasonably safe tool known as a pitching tool with which to cut granite, this being the work at which he was engaged at the time of his injury.

At the conclusion of the evidence his Honor entered judgment of nonsuit upon the ground that there was no evidence of negligence, and the plaintiff excepted and appealed.

W. T. Wilson and Louis M. Swink for plaintiff.

Alexander, Parrish & Körner for defendant.

ALLEN, J. "It has become elementary in the doctrine of negligence that the master owes a duty, which he cannot safely neglect, to furnish proper tools and appliances to his servants" (*Avery v. Lumber Co.,* 146 N. C., 595), and "He meets the requirements of the law if in the selection of machinery and appliances he uses that degree of care (71) which a man of ordinary prudence would use, having regard to his own safety, if he was supplying them for his own personal use." *Marks v. Cotton Mills,* 135 N. C., 290.

"The employee has the right to assume that these duties have been performed (*Jones v. Warehouse Co.,* 137 N. C., 343), and the employer has no right to delegate their performance to another. If he does so, he is 'liable for negligence in respect to such acts and duties as he is required or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. As to such acts the agent occupies the position of the master, and he is liable for the manner in which they are performed.' *Tanner v. Lumber Co.,* 140 N. C., 479; *Bolden v. R. R.,* 123 N. C., 617." *Mercer v. R. R.,* 154 N. C., 404.

In the last case cited the doctrine was applied to simple tools and the distinction between such tools and complicated machinery is discussed and pointed out.

Applying these principles to the evidence, we are of opinion that there is some evidence of negligence which ought to be submitted to a jury.

The plaintiff was an employee of the defendant at the time he was injured and was engaged in cutting granite with a tool known as a pitching tool. These tools are steel bars, about six or seven inches long, having a hand hold at one end and tapering down to a flange or arm at the other end. The flange or arm is used in cutting the stone, and in using it the workman holds the tool in one hand with the flange or arm resting against the stone and strikes the tool with a large hammer.

The plaintiff introduced evidence tending to prove that the defendant had on hand for the purpose of manufacturing tools, steel of three qualities, one good, another known as Harvey steel, and another known as burned steel; that this steel was first manufactured into steel points for

use in the surfacing machines of the defendant, and when the points became worn they were manufactured into pitching tools; that the steel known as the Harvey steel and the burned steel were defective and of such inferior quality that a tool made from them would burst when the tool was stricken by a heavy blow; that many of the pitching tools used by the defendant had burst when being used by its employees prior to the time of the plaintiff's injury, and that complaint had been made from time to time to the defendant, notifying the defendant of the defective steel that was being used in the manufacture of its tools; that at the time the plaintiff was injured he was furnished a pitching tool with which to do his work that had been worn until it was only four inches long; that in using it he placed the tool against the stone and struck it two blows, one light and one heavy, and that it then burst, causing pieces of the tool to strike the eye of the plaintiff and to seriously injure
(72) him; that the defect in the tool, caused by the use of the defective steel in its manufacture, could be observed by the workman who manufactured it for the defendant by reason of its expansion by heat, but that it could not be discovered by an employee using it.

One witness testified, "If this pitching tool had been made out of good steel and the manner in which I had sharpened it, it would not have bursted like it did," and another witness: "A low grade of steel is not considered proper to make tools out of. A low grade of steel is not supposed to be used to make hand tools, because in hitting it a blow it will fracture," and, again, this witness was asked, on cross-examination: "If you should find that this tool had been originally seven inches long and was worn down to four inches you would say that was a pretty good tool, wouldn't you?" and he replied: "I would say a piece of steel that had been crystallized down from seven to four inches is in pretty bad shape."

If this evidence is accepted by the jury it meets the requirements of the rule laid down in *Hudson v. R. R.*, 104 N. C., 491, which is approved in *Bradley v. Coal Co.*, 169 N. C., 255, requiring the employee who sues to recover damages resulting from the use of defective machinery furnished by the employer to prove (1) that the machinery was defective; (2) that the defects were the proximate cause of the injury; (3) that the employer had knowledge of the defect or could have discovered the defect by the exercise of ordinary care.

The judgment of nonsuit is set aside and a new trial ordered.

New trial.

Cited: Thomas v. Lawrence, 189 N. C. 526 (1g).

C. F. FINCH v. P. S. CECIL AND WIFE.

(Filed 17 November, 1915.)

1. Mechanics' Liens—Married Women—Executory Contracts—Interpretation of Statutes.

By chapter 106, Laws 1911, known as the Martin Act, a married woman may enter into an executory contract affecting her real and personal property, except with her husband, as if she were unmarried, and where she and her husband held the title to lands by entireties and they contract for materials used in a building thereon, those furnishing the material may acquire a lien on the property by complying with the provisions of the statute, Revisal, sec. 2016; ch. 617, Laws 1901.

2. Lien for Material—Estate by Entireties—Rev. 2016.

When material for building is furnished to husband and wife jointly, to be used on realty held by entireties, the lien given by Rev., 2016, attaches.

NOTE. The Court again suggests the repeal of estates by entireties.

APPEAL by defendants from *Lyon, J.*, at February Term, 1915, (73) of DAVIDSON.

E. E. Raper and Paul R. Raper for plaintiff.

L. A. Martin for defendants.

CLARK, C. J. This is an action to enforce liens for material furnished in the construction of two houses on lots owned by the defendants, husband and wife, to whom they had been conveyed in the same deed. It was admitted on the trial that the defendants were indebted to the plaintiff $68 for shingles used to cover one of the houses, and the jury found that the defendant also owed a further item of $67.90 for material used in building the houses.

The sole question presented is whether such indebtedness is a valid lien upon the property which was held by the defendants, Cecil and wife, in entirety. In this case the indebtedness is due by both the defendants who joined in the contract. If the debt were owing by the husband or by the wife for material furnished to erect a building upon property so held it would be uncertain who would be the survivor, and in such case we have held that an estate by the entirety cannot be encumbered nor a lien acquired upon it without the assent of the other (*West v. R. R.*, 140 N. C., 620; *Bruce v. Nicholson*, 109 N. C., 202), nor would a judgment against either be a lien upon the property. *Hood v. Mercer*, 150 N. C., 699. The reason given is that "at common law neither the husband nor the wife can deal with the estate apart from the other or

has any interest which can be subjected by creditors so as to affect the rights of the survivor." 15 A. and E. Encyclopedia (2 Ed.), 840, citing *West v. R. R., supra.*

In this case the deed was made to the husband and wife, both being recited as grantees, and of course the property can be conveyed by them in like manner. It follows that they could, by their joint deed, place a mortgage upon it, and when the material furnished is under a contract made by them both, the statutory lien given by Rev., 2016, attaches.

In *Weir v. Page,* 109 N. C., 220, the Court held that, as the law then stood, where the materials were furnished under a contract with the husband in the construction of a building on the wife's property, the material man could file no valid lien against the house, though the wife knew that the work was being done and the material furnished, but had made no objection. This was because the material was furnished under a contract not binding upon the wife. The Court, however, speaking through *Judge Davis,* in order to prevent further frauds of this kind, suggested in its opinion to the consideration of the Legislature whether a married woman's liabilities might not be "made commensurate with her rights, and whether such alterations in the law (in this par-
(74) ticular) would not prevent much injustice and many frauds."

The result was the enactment of ch. 617, Laws 1901, which has been added as the last paragraph in Rev., 2016, as follows: "This section shall apply to the property of a married woman when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such cases she shall be deemed to have contracted for such improvements." This statute does not even require an express contract by her, but provides that when she "consents or procures" the building to be erected or material furnished she shall be deemed to have contracted for such improvement, and her property thereupon becomes subject to liens, if filed. In *Finger v. Hunter,* 130 N. C. 529, this statute was held constitutional and was enforced, and that case has been approved in *Ball v. Paquin,* 140 N. C., 96, and other cases.

The above recital is taken from *Payne v. Flack,* 152 N. C., 600. This case is even stronger because here it is admitted that both the husband and wife were liable for this indebtedness, and the Martin Act, Laws 1911, ch. 109, has extended the power of a married woman to contract to all cases (except with her husband under Rev., 2107), as follows: "Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect *as if she were unmarried.*" The contract of the wife for this material being equally valid with that of the husband, the property is liable for the lien given to the material men by the statute. This is so even if it were an implied contract, by the last paragraph in Rev.,

2016, and for the stronger reason that the married woman is now liable on her contract as if unmarried, by the Martin act.

This estate by the entirety is an anomalous one in the law. It has been derived from the common-law conception that the legal existence of the wife was merged in that of her husband, and hence a conveyance to them during coverture did not create a tenancy in common, which necessarily requires more than one tenant, but created an estate in entirety, under which the entire property was that of the husband during his life with remainder to the survivor, and no lien thereon could be acquired by the deed of either one, without the assent of the other, nor could it be sold under execution against either (21 Cyc., 1195, 1198), nor could the property be aliened nor any part thereof without the consent of the other. *Ib.*, 1199.

In some of our states the doctrine of entirety has never been recognized, as in Connecticut, Minnesota, Ohio, Iowa. 21 Cyc., 1197. In England and many of our states the modern statutes relating to the property relation of husband and wife have abolished estates in entirety. In some this has been brought about by express enactment—Iowa, Maine, Massachusetts, New Hampshire. In others it has been held that estates in entirety were abolished inferentially by such statutes, (75) changing the relation of married women as to the control of their property—Mississippi, Nebraska, West Virginia, Michigan, and in England. 21 Cyc., 1202. A similar summary will be found in 15 A. and E. Enc. (2 Ed.), 846-851.

It has been a doubtful question whether the granting of a divorce will destroy a tenancy by entirety and render the tenants tenants in common. The weight of authority seems to be that it will. *Joerger v. Joerger* (Mo.), 5 A. & E. Anno. Cases, 534. This view has been adopted by our Court in *McKinnon v. Caulk*, 167 N. C., 411, holding, however, with citation of numerous authorities, that our Constitution and the later statutes relating to the property rights of married women have not thus far destroyed this estate by entirety.

It is commended to the consideration of the General Assembly whether it shall not abolish this anomalous estate, which gives rise still to so many complications. The reason for it having long since ceased to exist, the estate itself might well be abolished with injury to no one.

No error.

Cited: Odum v. Russell, 179 N. C. 9 (1g); *Turlington v. Lucas*, 186 N. C. 287 (1g); *Holton v. Holton*, 186 N. C. 362 (1g); *Johnson v. Leavitt*, 188 N. C. 686 (1f).

LEONARD S. MORGAN v. ROYAL FRATERNAL ASSOCIATION.

(Filed 17 November, 1915.)

1. Insurance, Life—Policies—Parol Contracts—Insurance Commissioner—Reinsurance—Evidence—Questions for Jury.

A valid contract for life insurance may rest in parol unless in contravention of some statutory provision or some principle of public policy; and where there is evidence tending to show that an insurance company, having many policyholders in this State, has been condemned in its methods by the Insurance Commissioner and its further continuance in business is prohibited, and its manager organized a new company to take over the business of the old company, collecting the premiums for such insurance on the old policies without issuing new ones except in acquiring new business; that it published this method by circular-letters to the policyholders in the retired company and to the Insurance Commissioner, who thereafter ordered that the policies in the new company should issue by that company to take up the policies issued by the old or retired one: *Held*, sufficient to be submitted to the jury upon the question whether the new company had agreed to become liable upon the policies of the retired company.

2. Same—Old Policies in Force—Death of Insured—New Policies.

Where an insurance company has been formed to take over the policies of a company whose continuance in business in North Carolina has been forbidden by the Insurance Commissioner, and which immediately puts into effect a method by which the old policies were continued in force and the premiums therefor collected by the new company, but which method was abandoned upon order of the Insurance Commissioner, and new policies accordingly issued: *Held*, that a policy of insurance thus continued in force by the new company and maturing by the death of the insured before the issuance of the new policies directed by the Insurance Commissioner, was a valid and binding obligation
(76) on the new company which had taken it over in the manner stated.

3. Insurance—Orders of Commissioner—Protection to Policyholders—Defenses.

An order of the Insurance Commissioner that a life insurance company issue new policies for those it carried in force for a company prohibited by him from continuing to do business in this State is made for the protection of the policyholders, and cannot be taken advantage of by the insurer in denying an obligation arising upon the maturity of the old policy by the death of the insured before the new policies were issued.

4. Principal and Agent—Insurance—Acceptance of Premiums—Ratification—Trials—Evidence—Questions for Jury.

Where the question of authority of one to bind his principal, an insurance company, by accepting premiums from policyholders, is in controversy, and there is evidence that this money was remitted to and accepted with the knowledge of the company's general manager, author-

ized to bind the company by the transaction, and his testimony is conflicting but sufficient upon the question of establishing the local agency, it is for the jury to determine which part of his testimony is true, and it may find the fact of agency therefrom.

5. Evidence—Inference of Fact—Appeal and Error.

In an action involving the liability of an insurance company in taking over policies of another company that had been retired from the State, it is incompetent for the Commissioner to testify as to his "understanding" of the statements made in his presence by the parties, in relation to their agreement with each other, for in this form it is objectionable as being his own inference and not what the parties said.

6. Same—Appeal and Error—Harmless Error.

Objectionable testimony of a witness of his opinion of, or inference from, a fact becomes harmless when it appears that he has given this testimony substantially in an unobjectionable form.

7. Evidence—Inference of Fact—Questions and Answers—Statements of Fact.

The answer of a witness will not be held as error for expressing his inference from a fact, when taken as a whole it permits the interpretation that it was a statement of fact relevant to the issue.

8. Evidence—Depositions—Exceptions—When Taken.

Objection to the competency of testimony regularly taken by deposition, subject to cross-interrogatories, and opened and left on file before the trial, cannot, except by consent, be taken for the first time upon the trial while the depositions are being read.

9. Evidence—Handwriting—Comparison of Signatures—Insurance Commissioner.

Where the Insurance Commissioner has testified that he is familiar with the signature on a letter sought to be introduced in evidence in an action against an insurance company, from correspondence with the writer through his department relating to official matters, it is competent for him to say that the signature to the letter, from his knowledge and familiarity therewith, is genuine.

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

APPEAL by plaintiff from *Devin, J.*, at March Term, 1915, of (77) FORSYTH.

Civil action to recover on a policy of insurance.

On a former trial of the cause, plaintiff recovered judgment, and defendant, having taken an appeal, a new trial was granted because of the admission of a letter of one Lucy Ragsdale, an agent, which was held to be hearsay and incompetent for reasons stated in the opinion of the Court, reported in 167 N. C., 262.

This opinion having been certified down, a new trial was entered on and, at close of testimony, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Alexander & Körner for plaintiff.
Hastings & Whicker for defendant.

HOKE, J. We have carefully examined the record and are of opinion that the judgment of nonsuit should be set aside and the issue as to defendant's liability submitted to the jury. As the case goes back for a new trial, we do not consider it desirable to state in detail or dwell upon the testimony relevant to the issue and which makes in favor of plaintiff's claim; but speaking generally, and as we understand the record, there are facts in evidence tending to show that, in 1910 and before that time, the Royal Benefit Society, an insurance company operating on the lodge system and having its home office in Washington, D. C., had organized a large number of lodges in this State and there were several thousand policies (10,000) in force here, one of which, held by Sarah C. Morgan, who died in July, 1910, and of which present plaintiff was beneficiary, is the policy sued on; that C. B. Bailey was vice-president of this company and had been chiefly in charge and direction of the company's business in this State, being general agent for North and South Carolina; that in May, 1910, the Insurance Commissioner, becoming dissatisfied with the methods and standing of this company, revoked its license to do business in this State, and thereupon the said C. B. Bailey and some others, the said Bailey being general manager, organized the defendant company on substantially the same system, with the view and purpose of taking over policies in the old company, caring for the interests of the policyholders therein who were resident in this State and conducting an insurance business on substantially the same plan as the older company; that it was a feature of the scheme and plan not to issue new policies to the members of the former company, but to allow them the benefits of membership and subject to the obligations of the same under the terms and conditions of the policies already held by them, and to issue new policies only to new members; that the new company was duly organized and licensed and immediately
(78) entered into business, appointed agents, made collections, solicited new business, but did not issue directly any new policies or take in new members till August and September, this being after the death of Sarah C. Morgan, the holder of policy; that about the time the defendant company was organized, or soon thereafter, there was issued, on paper containing official letter heads giving names of the officers, including that of C. B. Bailey, third vice-president, and purporting to come from the

home office of the old company and to be signed by M. B. Garber, the secretary of said company, circular-letters, one addressed to the collectors of the old company and one to the members, advising them in effect that the old company had gone out of business and that its officers and business "would be transferred over to the Royal Benefit Association, of which C. B. Bailey, at Charlotte, was general manager," etc. And the collectors were requested further to go right on and make collections in the name of the defendant company, changing the members' receipts, showing that this company was the recipient of the amount paid, etc. The circular to the members contained the statement also that: "We have deemed it advisable to transfer all the North Carolina members to the new organization as we believe that the interest of the members can best be served in that way"; that these circulars were sent to the office of the Insurance Commissioner; that C. B. Bailey was cognizant of their being issued, and approved the same and received copies, and the holder of the present policy also received one, and same were distributed generally throughout the State among parties interested. That among the agents appointed and acting for the new company was Lucy Ragsdale, who had served in like capacity for the old company when it did business, and, after issue and receipt of these circulars, there was paid, in the latter part of June, 1910, for Sarah C. Morgan to Lucy Ragsdale, agent of defendant, the fees due on the policy, amount $1.25, and this money, with other receipts, was sent to the new company and entered in its books at its headquarters at Charlotte, N. C., and same, pursuant to notice, were produced, showing an entry of a long list of names, including among them Sarah Morgan, policy No. 28343, payment for month of June, 1910, $1.25, together with a letter from company in acknowledgment of the remittance, beginning: "Your report of July collections has been received," etc., giving detailed statement of amounts.

It further appears that the Insurance Commissioner disapproved of the methods suggested, by which the old members were to be carried by the new company under the policies which they held, on the ground that it did not sufficiently safeguard the interest of these old policyholders, and that the new company, as stated, commenced to issue policies direct to new members in August, but that no new policy was ever issued to Sarah C. Morgan, who, as stated, had died in the preceding July.

It is recognized in this State that, unless in contravention of (79) some statutory provision or some principle of public policy, an oral contract of insurance may be a binding obligation, and these facts making in plaintiff's favor, in our opinion, present evidence from which such a contract may be inferred, and if they are accepted by the jury and it is established by the verdict that defendant company organized to take over the membership of the old company, entered into a contract of in-

surance with this Sarah Morgan under the terms and conditions of a policy already held by her, and her claim is otherwise regularly established, pursuant to the rules of the company, we see no reason why a recovery in favor of the beneficiary should not be sustained.

It may be well to note that, as the facts are now presented, it is not a case coming properly under *Shoaf v. Insurance Co.*, 127 N. C., 308, where a second company was held responsible on policies of the first by reason of having taken over the latter's assets, a liability which was there held to prevail notwithstanding an express stipulation that the second company should not be liable; but it is a question of contract between the parties where the agreement of one may well be held a valid consideration for the agreement of the other and constituting, if made a binding obligation.

It is urged in defendant's favor that defendant did not issue policies, or commence doing business till August, 1910, and at that time Sarah Morgan was dead, and no contract could therefore be established; but this, to our mind, is not the correct interpretation of the testimony, and is furthermore defective in that it assumes the very question that is in debate between the parties. It is true that the new company did not issue any of its own policies till fall, but the testimony is all to the effect that it began doing business shortly after it was licensed, collecting money, soliciting new business, etc., and the plan was, as stated, to continue the old members under these old policies, but the Insurance Commissioner disapproved and directed that policies issue in all cases. Thus, in the evidence of C. B. Bailey, who testified that he was vice-president and general manager of the old company till May, 1910, and that said company having been forbidden to do business any longer in the State, he had then organized the new company, stated further in his testimony: "It was my plan not to issue any new policy except to new members. We *began business* right away in June, 1910, and, in the meantime we collected money, in May, collected right along in May, 1910." And if, under this plan to hold old members under the terms of the old contract, defendant company received dues from or for S. C. Morgan and same were paid and received as a member of the new company, it would, as stated, be evidence from which a contract might be inferred.

Again it is urged that the plan devised for continuing the old
(80) members under the old policies having been disapproved by the commissioner, the scheme was thereby rendered unlawful and no recovery should be allowed, but the authorities are to the effect that, when a statute or valid regulation in restraint only of the company's action is made for protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation. *Robinson v. Life Insurance Co.*, 163 N. C., 415; *Blount v. Fraternal Assn.*, 163 N. C., 167.

It was further contended that the payment to Lucy Ragsdale should not be allowed significance on the issue of defendant's liability because of the fact that Lucy Ragsdale was also collecting for the old company, and by reason of the testimony of C. B. Bailey that he remitted amounts collected for old company to their office at Washington.

There is no testimony from Lucy Ragsdale that she continued to act for the old company. Her report made and her collections sent were to the new company, defendant, and there is evidence tending to show that it was entered on the books of this company at Charlotte, N. C., and the testimony of the witness Bailey is far from positive or satisfactory that the money paid on the policy of S. C. Morgan was remitted to the old company. It seems there was some uncertainty as to the name on the defendant's books, whether Morgan or Morgar, and the number of the policy on the book appeared to be 28343 instead of 58343; but the name and the amount paid and the date as it appeared in the books corresponded with other evidence of plaintiff as to this payment, and the witness Bailey, speaking to this question and the name as it appeared in the books, said: "Things were so confused at that time, getting members and all, that I don't know just how that was. If they didn't have a policy it was transferred to the Royal Benefit Society. If money is sent to me through mistake which is meant for them, I send it to them. The commissioner had forbidden the Royal Benefit Society to do business in North Carolina and, if Sarah *Morgan* or Sarah *Morgar* is on there, *it is my business.* It was my plan not to issue new policies except for new members."

True, the witness goes on and gives reasons or facts tending to show that the name appearing on the books was not that of Sarah Morgan, but when a witness makes statements having differing tendencies it is for the jury to say which of such statements shall prevail. *Dail v. Taylor,* 151 N. C., 284 and 289.

There are several adverse rulings of the court on the reception of evidence and, although they may not be presented on another trial, we consider it well to deal at least with some of them.

There is nothing to materially change the significance of the record as to the letters of Lucy Ragsdale, making certain admissions tending to charge defendant company, and, under the decision on the former appeal and as the evidence now stands, the letter was properly excluded. (81)

And the ruling of the court excluding the testimony of the Insurance Commissioner as to "his *understanding*" of the statements of Bailey and the organizers as to the purposes and plans of the new company and as to what was the "meaning" of their "statements to him on the subject" can perhaps be upheld because in the precise form in which

it is presented it professes to give the *inferences* that the commissioner made from their statements and not what these parties said.

There is authority to the effect that testimony in this form may, at times, be properly interpreted as the statement of a fact (*Gilliland v. Board of Education,* 141 N. C., 482), but the matter is not of importance, as the witness had already stated the relevant facts in unobjectionable form, and the witness C. B. Bailey had testified in substance to like effect.

Objection was made to the decision excluding the following statement in the deposition of Leonard Morgan, the plaintiff: "When the Royal Benefiit Society left North Carolina its contracts, including my mother's policy, were assumed by the Royal Fraternal Association without issuing new policies or re-examination of the old policyholders in the Royal Benefit Society. My mother kept up the Royal Benefit Society policy with the new company, the Royal Fraternal Association." The objection is made to rest on the position that this answer purports to give an opinion of the witness or his deduction from certain facts and not the facts themselves. While this answer may be construed as a deduction of the witness, and so objectionable under the authorities cited, it also permits the interpretation that it is a statement of facts relevant to the issue: that the company assumed the payment of the policies and that his mother kept up the premium. *Renn v. R. R., post,* 128. This deposition, it seems, was taken after due notice, in which cross-interrogatories were filed by defendant and no objection appears in the deposition. It was open and on file for some time before the trial, and objection was first made on the trial as the deposition was being read in evidence. Under our decisions, and unless by consent of parties, it seems that the objection should not now be allowed. *Ivey v. Cotton Mills,* 143 N. C., 189 and 197; *Bank v. Burgwin,* 116 N. C., 122 and 124.

The court also excluded the opinion of the Insurance Commissioner as to the handwriting of M. B. Garber, national secretary of the former company, and purporting to be subscribed to the circular-letters sent to his office and generally throughout the State. The preliminary statement of the witness on this question appears in the record as follows: "I am familiar with the signature of M. B. Garber only through letters that have come into this department signed by him. I have been having correspondence with him and seeing his signature ever since he has been connected with this society. Basing my knowledge on my familiarity with his signature, I say that the signatures to the exhibits signed M. B. Garber are his signatures."

(82) In order to give an opinion as to the genuineness of handwriting it is not necessary, under our decisions, for the witness to have acquired his knowledge from seeing the person write. It may be acquired by examination and perusal of letters and documents known to be in his

handwriting. *Nicholson v. Lumber Co.*, 156 N. C., 59; *Tuttle v. Raney*, 98 N. C., 513. On this subject, in *Nicholson's case*, it was held as follows: "A witness, whether an expert or another who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write, or from having it in the ordinary course of business seen writing purporting to be his and which he has acknowledged or upon which he has acted or been charged, may give such opinion in evidence when a relevant circumstance"; and, in *Raney's case, supra:* "While it is not competent to prove handwriting by comparison, it is not necessary that the witness shall have seen the person whose writing is the subject of controversy, write. It is sufficient if he shall have acquired by other means, as by receiving letters or handling papers of admited genuineness, knowledge to enable him to identify the writing. From these and other like cases, it appears that the Insurance Commissioner was a competent witness and that his testimony should have been received.

There is error. The judgment of nonsuit will be set aside and the cause referred to the jury under appropriate issues.

Reversed.

WALKER, J., dissenting: Finding myself unable to agree with my brethern in this case, I think it proper to fully state the reason why I differ with them. I admit that this is not the same case as was here at the last term, as some new evidence has been added, and the same question is not presented as to the competency of Miss Lucy Ragsdale's letter, which we commented upon before and for the admission of which the new trial was ordered. But I do not think what is supposed to be new evidence in the sense that it tends to establish the liability of the defendant to answer for the debts or obligations of the other society, which has been banished from the State, growing out of its insurance contracts—should have the least significance in the case, as it does not tend to prove any material facts upon which such liability can be based. What was said or done by the agent at Charlotte was not competent to fix the defendant with such liability, for it does not appear that he had any authority from it to act in the premises, and, besides, it does not tend to prove anything that is material. The *subpœna duces tecum* was issued to C. B. Bailey, who represented the Royal Benefit Society—whose license to do business in the State had been revoked, and which had insured Sarah C. Morgan—and who also represented the defendant. The book he produced contained the entry "Sarah Morgan, policy No. (83) 28343," whereas, her policy number in the Royal Benefit Society was 58343. Sarah C. Morgan died a month before the defendant, the Royal Fraternal Association, began to insure. The latter society was

conducted on the lodge plan and was authorized to do business only in that way. This required an application to be made for membership, and a medical examination before entrance, and if satisfactory and the application was approved, a policy of insurance then issued.

Sarah C. Morgan never had a policy in this defendant company, nor was she a member of the order. It was impossible for her to have been such, as she was dead when it received its first application for membership. It would interfere very seriously with the proper and lawful exercise of its francise if the defendant should be permitted to do business in the way suggested by the plaintiff. The essence and entire scope of its plan and its contemplated methods of business are opposed to any such conduct on its part. There is absolutely nothing to charge it with liability save the loose and unauthorized statements of third parties, which fall within the category of the rankest hearsay. It appears that it did no insurance business until 1 August, 1910, when its first policy was written. The brief of plaintiff admits that it was forbidden by the State Insurance Commissioner, Mr. James R. Young, to conduct business in any other way than by issuing new policies: so, therefore, it appears from this fact that it would have been contrary to law for it to guarantee the payment of policies issued by other companies, and surely it would be a violation of its chartered privileges. There is nothing whatever in this case to create an estoppel. The defendant received none of the assets of the other society as a trust fund to pay its liabilities, and Mrs. Morgan did not change her position to her detriment by reason of anything done by the defendant, which would be necessary to raise any kind of estoppel. 29 Cyc., 49. The charter of the defendant entered into and formed a part of any contract of insurance made by it (29 Cyc., 69), even if there had been any dealings between Mrs. Morgan and defendant, and she was bound to take notice of its powers and privileges and the limit of its authority to contract. But defendant had no dealings with her, and the whole contention of the plaintiff can rest only upon the fact that the agent of the Royal Benefit Society happened also to be the agent of the defendant, but this is fully explained (if it could possibly have any such legal effect as to form a contract), by the statement that he was collecting for the former company in the winding up of its business preparatory to its withdrawal from the State, under the order of the commissioner, and did not collect anything for defendant execpt on its own business, which consisted entirely of new insurance.

The court took this view of the matter and ordered a nonsuit,
(84) which I think was a correct ruling, as the evidence is as far from making out a case against defendant as it could possible be.

Surely the defendant cannot be bound, in law, by the acts, conduct or declaration of a third party having not the semblance of authority to

act in its behalf. The acts and statements of a person, even one professing to be an agent, are not competent to establish his agency for another. This must be done independently before his acts can bind the alleged principal, and there is nothing more in this case than such acts or declarations, if there is any evidence to show even such a state of facts. It would be dangerous in the extreme to permit such evidence to go to a jury as tending to establish an agency, *or an* authority to bind another, and especially a defendant, like this one, which has only special and limited powers under its charter of a very peculiar nature. The devotion of its funds to a purpose not contemplated by its charter would seriously interfere with the orderly and regular transaction of its legitimate business. Besides, a promise or undertaking to pay or guarantee the debt of another must be in writing unless where the party to be charged has received funds to pay the same and, therefore, holds as a trustee, or is bound because of a promise implied from the fact of having received the fund. The judgment, in my opinion, should be affirmed.

JUSTICE BROWN concurs in this dissenting opinion.

Cited: Davis v. R. R., 172 N. C. 211 (3p); *Steel Co. v. Ford,* 173 N. C. 196 (8f); *Oil Co. v. Burney,* 174 N. C. 384 (9f); *Bixler v. Britton,* 192 N. C. 202 (8f); *McNeal v. Ins. Co.,* 192 N. C. 452 (3f); *Lee v. Beddingfield,* 225 N. C. 574 (9f).

A. M. HADLEY v. T. D. TINNIN.

(Filed 17 November, 1915.)

1. Slander—False Pretense—Evidence—Trials—Questions for Jury.

Where there is evidence in an action for slander, that the defendant told a witness that the plaintiff had obtained the defendant's property by false pretense, on an occasion not claimed to be privileged, and justification is not pleaded, the crime of false pretense being punishable by imprisonment in the penitentiary, is a charge of an infamous offense, which is actionable *per se*, and affords evidence sufficient to sustain the action.

2. Same—Witness—Conflicting Testimony.

An action will not be dismissed upon failure of evidence to sustain it, when it depends upon the testimony of a certain witness and is sufficient on direct examination, though the witness weakened his evidence on defendant's cross-examination, for it is for the jury to determine the truth of the matter under conflicting evidence of this character.

3. Same—Express Malice—Evidence.

Evidence in an action for slander is sufficient to show express malice when it tends to show that the defendant had consulted with a justice of the peace before swearing out the warrant against the plaintiff, (85) and was advised that the criminal charge would not hold; that they agreed that the plaintiff was not financially responsible, and at the request of the defendant the magistrate withheld issuing the warrant to see if the plaintiff would return defendant's horse the latter alleged was taken from him by false pretense; that when this was not done and the warrant finally issued, the defendant said he would get even with the plaintiff if it cost him $1,000.

4. Malicious Prosecution—Termination of Criminal Action—Evidence.

Where the prosecutor, under an indictment charging that the defendant obtained his horse by false pretense, withdraws the warrant from the justice of the peace before the time set for the trial, but after it had been returned and served, and burns it, it is sufficient evidence that the prosecution had been terminated, in an action for slander brought by the defendant against the prosecutor.

5. Malicious Prosecution—Arrest—Evidence—Trials.

Where in an action for malicious prosecution there is evidence tending to show that a warrant for plaintiff's arrest had been sworn out by the defendant, the prosecutor in the criminal action; that the officer serving the warrant read it to the plaintiff and told him he could see the justice of the peace issuing the warrant, about arranging the bond, which was not required under an agreement that plaintiff would attend the trial, which was not had because the defendant theretofore terminated the prosecution: *Held*, some evidence of the fact of plaintiff's arrest, and involved the questions whether that was the intention of the officer serving the warrant or whether the plaintiff understood he was under compulsion to attend the trial.

APPEAL by plaintiff from *Cooke, J.*, at the May Term, 1915, of ALAMANCE.

Action to recover damages, the plaintiff alleging a cause of action in slander in that the defendant charged him with the crime of false pretense, and another cause of action for malicious prosecution in procuring and prosecuting a criminal warrant, charging the defendant with false pretense.

At the conclusion of the evidence his Honor entered judgment of nonsuit upon the ground that there was no evidence to support the action, and the plaintiff excepted and appealed.

J. S. Cook for plaintiff.

E. S. Parker, Jr., and J. Dolph Long for defendant.

ALLEN, J. We do not understand why his Honor concluded that there was no evidence to support the cause of action for slander, as a

witness for the plaintiff, J. C. McAdams, testified that the defendant said to him: "He (Hadley) had got his mare by false pretense" on an occasion which is not claimed to be privileged, and the defendant has not pleaded justification.

The crime of false pretense is punishable by imprisonment in the penitentiary, and to charge one with an infamous offense is actionable *per se* (*McKee v. Wilson,* 87 N. C., 300), and "In libel and (86) slander, if the words are actionable *per se,* the law presumes malice, and the burden is on the defendant to show that the charge is true unless the communication is privileged." *Ramsey v. Cheek,* 109 N. C., 273.

It is true that the witness McAdams weakened the force of his evidence upon the cross-examination, but as was said in *Poe v. Telegraph Co.,* 160 N. C., 315, "We are not at liberty to rest our opinion upon contradiction in the evidence, as the law commits to the jury the duty of determining the weight that shall be given to the evidence."

There is also evidence of express malice, as the justice of the peace to whom the defendant applied for a warrant testified that, after the defendant had told him the facts upon which he relied, he advised him against taking out the warrant and told him he did not think the criminal charge would hold; that they talked about the financial condition of the plaintiff and agreed that he was not financially responsible; that the defendant told him not to have the warrant served until the Monday following; that he wished to wait and see if the plaintiff would return him the horse; that when the defendant was informed on Monday morning that the plaintiff would not return the horse he said he would get even with the plaintiff at the courthouse if it cost him $1,000; that he then caused the warrant to be served and afterwards withdrew it without further prosecution.

We are also of opinion that there is evidence to sustain the charge of malicious prosecution. There is evidence that the defendant caused the warrant to be issued charging the plaintiff with the crime of false pretense and that the criminal charge was terminated prior to the institution of this action, as a prosecution my be terminated by the order of the justice's court or by some unequivocal act of the prosecutor (*Brinkley v. Knight* 163 N. C., 196), and there is some evidence fit to be considered by the jury that the plaintiff was arrested. The defendant, according to the evidence, went to the justice of the peace after the warrant had been returned as served and told him that he wished to withdraw it, and the warrant was then delivered to him and he burned it. This is, we think, evidence of the termination of the prosecution.

The officer who was entrusted with the duty of serving the warrant testified in substance that he read the warrant to the plaintiff and told

him he could see the justice and arrange the bond if any was to be given, and that the plaintiff said he would do so; that the justice was passing by and he called to him; that the justice said he would not require a bond if the plaintiff would agree to attend the trial, which he did. There is also evidence that the plaintiff did not attend the trial because he was informed that the warrant was withdrawn, and the plaintiff himself testifies that he was arrested by the officer.

(87) If, upon this evidence, it was the intention of the officer to arrest, and the plaintiff understood that he was under compulsion to attend the trial, it would furnish some evidence of an arrest.

The Court says, in *Lawrence v. Buxton,* 102 N. C., 131: "The term 'arrest' has a techincal meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by, the process, through and by the officer or agent charged with its execution. The certain and most unequivocal method of making an arrest is by the actual seizure of the person to be arrested; but his is not essential; it is sufficient if such person be within the control of the officer, with power of actual seizure, if necessary. The officer need not touch the person of such party to make the arrest effectual, but he must have and intend to have control of the party's person. This seems to be necessary to constitute a valid arrest. If the officer has process, and intends presently to execute it, and the person against whom it is directed recognizes it and submits to the control of the officer, this would be sufficient arrest, because thus the officer would get the custody and control of the person of the party. But if there is no actual seizure of the person the officer must intend to make the arrest and have present power to control the party arrested. Thus, if the officer go into a room and tell the person therein to be arrested that he arrests him, and locks the door, this has been held to be an arrest. If, however, the officer has present power, and intends to make the arrest, and the party to be arrested submits to his arrest—consents to be subject to the officer—this is sufficient."

It is not necessary to consider the other questions raised, as the plaintiff can present all of his evidence and his contentions under the two causes of action which we have discussed.

Reversed.

Cited: Stancill v. Underwood, 188 N. C. 477 (3f); *In re Fuller,* 189 N. C. 512 (2f); *Deese v. Collins,* 191 N. C. 750 (1g); *Winkler v. Blowing Rock Lines,* 195 N. C. 675 (4g); *Tomberlin v. Bachtel,* 211 N. C.

268 (2f); *Smith v. Land Bank,* 212 N. C. 82 (2f); *Chestnutt v. Durham,* 224 N. C. 151 (2f).

W. R. COMBS ET ALS. v. COUNTY COMMISSIONERS ET ALS.

(Filed 17 November, 1915.)

1. Public Roads—Taking of Soil—Interpretation of Statutes.

Sec. 11, ch. 581, Laws of 1899, confers power only to enter upon uncultivated lands for the purpose of procuring soil to use in the construction of public roads, and entry upon cultivated lands for that purpose is without authority of law.

2. Same—Uncultivated Lands.

Lands are cultivated within the meaning of section 11, ch. 581, Laws of 1899, the soil of which may not be taken for use on the public roads, when at the time the soil therefrom is proposed to be taken they are covered with stubble from the crops harvested therefrom, and which have been in cultivation for a term of years and intended by the owner for continued cultivation; and the fact that at the time in question they were not under immediate cultivation does not affect the matter.

3. Same—Equity—Injunction.

While equity will not restrain a mere trespass if due compensation can be awarded for the injury, it will do so, in proper instances, where it is continuous in its nature, or if it will destroy or seriously impair the property and prevent its enjoyment as it has been used. Hence, when the owner of lands has been cultivating them, and by unlawfully taking the topsoil thereof for use on public roads it will destroy the value of the lands for the making of the crops, equity will enjoin the continuance of the unlawful act.

APPEAL by defendant from *Cline, J.,* at chambers in WINSTON- (88) SALEM.

Action instituted by the plaintiffs, abutting landowners, on a public highway leading from Leaksville-Spray to Reidsville. The defendants, the county commissioners and the superintendent of roads of Rockingham County, are undertaking in their official capacity to permanently improve said road by topsoiling. The plaintiffs sued out a restraining order, the grounds upon which they ask relief being that they are citizens of the county of Rockingham and own lands abutting on said highway near the town of Leaksville in said county, and that the defendants are taking, and about to take, certain topsoil from their lands for the purpose of improving said public highway; that the defendants have no right to enter upon their lands and take said topsoil, for the reason that

the statute, section 11, ch. 581, of the Public Laws of 1899, under which they are acting, does not authorize them to do so, because the said section only authorizes the taking of soil from uncultivated lands. They allege that their lands are cultivated lands within the meaning of said section, and, therefore, the defendants have no right to take the same for road purposes. The defendants answer and allege that the board of county commissioners of Rockingham County have passed a resolution directing the superintendent of roads to do this identical work, and have directed him to take this topsoil; that they have a right to take the same for the reason that the lands of the plaintiffs at this point are not cultivated lands within the meaning of said section, but that they are uncultivated lands, not being in actual cultivation at this time.

Upon the hearing his Honor rendered the following judgment, containing his findings of fact, which are fully supported by the affidavits:

This cause coming on to be heard by the undersigned at chambers in Winston-Salem, N. C., 7 October, 1915 (the hearing having been by consent continued from 4 October, 1915), upon the motion of the plaintiff to continue the temporary restraining order to the hearing, at which time and place the parties appeared by counsel and in person, and after
(89) considering the pleadings and the affidavits filed, the undersigned, in addition to the admissions contained in such pleadings, makes the following findings of fact, to wit:

1. That there is a public highway between the towns of Leaksville-Spray and Reidsville, in Rockingham County, a distance of thirteen miles, which is a much-used road. That said road was laid out and established several years prior to this litigation, and has been used during that time as one of the public roads of said county, but has never been topsoiled or sand-clayed; that at a meeting of the county commissioners held on Monday, 7 June, 1915, said board of commissioners adopted a resolution reciting that in their judgment permanent roads are a public necessity and that the aforesaid road be sand-clayed and topsoiled.

2. That the improvement of the road as aforesaid, by topsoiling, is a public necessity, the court not reviewing the judgment of the commissioners.

3. That the plaintiff Combs is the owner of a tract of land containing seventy-two (72) acres, abutting on said road for a distance of one-half a mile. That, of seventy-two acres, ten acres, which lie adjoining and adjacent to said road, is a gray topsoil, peculiarly adapted to the cultivation of bright tobacco, and that he has only ten acres of this type of land in his entire tract.

4. That the said commissioners desire to take soil from about three acres of the land in question, and it is proposed to use said soil upon

the road abutting the land of Combs for one-fourth of a mile, and for an additional one-fourth of a mile to the Dan River bridge, said road for the last named one-fourth of a mile abutting the lands of other persons.

5. That the aforesaid ten acres of land has been cultivated by rotation of crops annually for about fifteen years, and that last year said land was in wheat, and is now in stubble, and plaintiff Combs proposes to put it in tobacco next season, and that said land is cultivated land.

6. That the defendants went upon said land and began taking off the topsoil, to be used in topsoiling the said road, and had removed the greater portion of the topsoil from a half acre, and were intending to use the topsoil from an additional acreage of approximately two and one-half acres, when the temporary restraining order was issued and served.

7. That there are other lands in the same neighborhood that have a topsoil suitable for this purpose, but the lands of the plaintiff Combs are the most convenient lands that could be reached for improving that part of the road in question, and the additional distance of the land from other lands, even if defendants could take the topsoil there, would considerably increase the expense of the work.

8. That to remove the aforesaid topsoil from the land in ques- (90) tion will render it unfit for cultivation of tobacco of the type that has been theretofore raised on it.

It is thereupon ordered and adjudged that, so far as the plaintiff W. R. Combs is concerned, that the restraining order heretofore issued be continued to the hearing; and that as to the plaintiffs Carter and Roberts the same is dismissed without prejudice to their right to apply in the future for a restraining order, should they be so advised.

E. B. Cline, *Judge.*

The defendants excepted and appealed.

R. J. Joyce, J. M. Sharp, and Manley, Hendren & Womble for plaintiffs.

P. W. Glidewell and Ira R. Humphreys for defendants.

ALLEN, J. The power conferred upon the defendants by the statute under which they are acting is to enter upon *uncultivated lands* for the purpose of procuring soil to use in the construction of roads, and if the land of the plaintiff is cultivated land they are without authority of law.

The question has been settled against the contention of the defendants upon the facts found by his Honor in three cases in our reports (*S. v. Allen,* 35 N. C., 36; *S. v. McMinn,* 81 N. C., 585; *S. v. Campbell,* 133 N. C., 640), and we see no reason for departing from the definition there

given to the term "cultivated field," which is "that where a piece or tract of land has been cleared and fenced and cultivated, or proposed to be cultivated, and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the inclosure at the time of the trespass, it is a cultivated field within the meaning of the statute."

If the defendants have no right to enter upon the lands of the plaintiff, do their acts present and threatened, in going upon the land and taking the topsoil therefrom, thereby destroying it for the purposes for which it has been used, constitute irreparable injury?

It is true that equity will not ordinarily restrain a mere trespass, if due compensation can be awarded for the injury, but if the trespass is continuious in its nature, or if it will destroy or seriously impair the property and prevent its enjoyment as it has been used, equity will interfere.

"Equity will not interfere to restrain a trespasser simply because he is a trespasser. The injury complained of must be ruinous to the property in the manner in which it has been enjoyed, and such as permanently to impair its future enjoyment." Bispham's Eq., sec. 436.

In *Cowper v. Baker,* 17 Ves., 128, *Lord Eldon* restrained the tak-
(91) ing of certain stones necessary in the manufacture of cement "because it was taking away the substance of the inheritance." Bisph., sec. 436.

"Nor will equity interfere to restrain a trespasser simply because he is a trespasser, but only because the injury threatened is ruinous to the property in the manner in which is has been enjoyed, and will permanently impair its future enjoyment." 1 High Inj., sec. 701.

"The rule is well settled that when the injury goes to the destruction of the inheritance, it is irreparable, and the trespass will be enjoined. The injury may consist in the destruction of that on which the value of the estate depends, or in the destruction of the estate in the character in which it has been enjoyed. So threatened occupation by permanent structures may be injoined. The injury would be irreparable in its nature. . . . When municipal authorities threaten to enter upon and take permanent possession of land for a public use without having acquired the right by complying with the statutory requirements, an injunction may be granted in part and refused in part." 22 Cyc., 831 *et seq.*

"In the application of this restriction, much difficulty occurs in defining what injury is irreparable. The word means that which cannot be repaired, retrieved, put back again, atoned for." *Gause v. Perkins,* 56 N. C., 179.

We may conclude with the statement of the Court in *Lumber Co. v. Cedar Works,* 158 N. C., 161, which is equally applicable to the defendants:

"It would be a most extraordinary destruction of the rights of property if a private corporation possessing no power of eminent domain could seize the lands of another to which it had no semblance of title and appropriate them to its own use simply because it was able to respond in damages. This contention of the defendants is, in our opinion, without support in reason or authority."

Being, therefore, of the opinion that the land of the plaintiff is not an uncultivated field, and that the plaintiff is entitled to injunctive relief, the judgment is

Affirmed.

Cited: S. v. Cornett, 199 N. C. 635 (2p).

(92)

LUTHER RAGAN, BY HIS NEXT FRIEND, v. DURHAM TRACTION COMPANY ET ALS.

(Filed 17 November, 1915.)

Electricity—Dangerous Instrumentalities — Inspection of Wires — Negligence—Evidence—Questions for Jury.

A corporation using electricity for lighting and power purposes, with its wires running along or above the streets of a town, are held to a high degree of care in the supervision and maintenance of its wires for the protection of the public from the danger of its use; and where, in an action to recover damages against such corporation, the evidence tends to show that a chain hanging down along a post, used in manipulating its arc street lamps, came within reach of children twelve years of age, and at the time in question had become so charged with electricity as to shock and seriously injure a boy fourteen years of age who caught hold of a ring at the lower end thereof; that this chain was not insulated or provided with the usual block arranged to intercept the current: *Held,* sufficient upon the question of the defendant's actionable negligence in permitting the conditions to exist. *Parker v. Electric Co.,* 169 N. C., 68, cited and distinguished.

APPEAL by defendant from *Cooke, J.,* at January Term, 1915, of DURHAM.

Civil action brought to recover damages for personal injury. His Honor at the close of the evidence sustained a motion to nonsuit, from which judgment the defendants appealed.

It is admitted upon the argument in the Supreme Court that the motion to nonsuit as to the defendant Interstate Telephone and Telegraph Company was properly allowed, and as to that defendant the judgment of nonsuit is affirmed.

Manning, Everett & Kitchin for plaintiff.
Bryant & Brogden for defendant Traction Company.
Fuller & Reade for defendant Interstate Telephone Company.

BROWN, J. The testimony set out in the record in this case tends to prove that the defendant, the Durham Traction Company, operates the street car line in the city of Durham, and in addition thereto supplies electric current for lighting the streets of Durham, as well as for private purposes. The street cars are operated by overhead trolleys suspended in the usual way from wires running on poles on either side of the street. The streets are lighted by arc lights suspended over the streets and fed from wires that run from the same poles.

In order to repair the arc lights and replace the carbons therein, the lights are raised and lowered by a metal chain with a ring at the end, which hangs down the poles, and these poles are placed on the edge of the sidewalk in reach of boys no larger that a twelve-year-old boy. In some of the chains there is a wooden link or block. This wooden
(93) block serves to intercept the current of electricity that may charge the chain. The electric wires feeding the trolley for the street cars and supplying the current for electric lights run on the same poles.

On Sunday morning, 19 January, 1913, the plaintiff was injured on Angier Avenue, a street lighted by the defendant, by coming in contact with a chain used in lowering and raising the arc lights. The evidence shows that the plaintiff, a boy of fourteen years of age, with a small companion, saw two or three boys standing by the pole, taking hold of the ring in the chain used for lowering and raising the arc lamp. The plaintiff imitated the example of the other boys and took hold of the chain, and at the same time the street car was approaching, when the plaintiff received a severe shock, causing the injury complained of. His companion testified that when the plaintiff took hold of the chain he tried to pull him loose and the electricity ran up his arm. Another witness testifies that when he first saw the plaintiff he was hanging in the ring of the chain apparently dead. There is other testimony tending to prove that he suffered a very severe electric shock.

The evidence also tends to prove that this chain hangs down the pole to such a distance that the ring at the end of it is within easy reach of the average sized boy.

We think his Honor erred in sustaining the motion to nonsuit as to the Traction Company. The case falls within the principle laid down in *Benton v. Public Service Corporation,* 165 N. C., 354, and in *Ferrall v. Cotton Mills,* 157 N. C., 528.

In the *Burton case* the Court said: "It is well settled by the decisions of this and other courts that those who deal in electricity and furnish it for use are held to the highest degree of care in the maintenance and inspection of the wires through which the current passes." In that case the boy was killed by coming in contact with an uninsulated wire extending through the branches of a tree up which he had climbed. In this case the plaintiff was injured by taking hold of a chain hanging down a pole on the sidewalk. The chain ought not to have been charged with electricity; it was evidence of negligence, certainly in the absence of any explanation by the defendant, that a chain hanging down the side of a pole on a public sidewalk within reach of children twelve years of age should be charged with such a current of electricity as to produce the effect it did upon the plaintiff. Such is clearly the doctrine of *Hanes v. Gas Co.,* 114 N. C., 203, wherein it is held:

"It is the duty of a corporation, or others using the streets of a city by permission of the authorities for purposes of gain, to so conduct their business as not to injure persons passing along such streets, and to keep the highways occupied by their apparatus in substantially the same condition as to convenience and safety as they were in before such occupancy."

It is further said in that case that the "utmost degree of care in (94) the construction, inspection and repair of wires and poles is required of those who are allowed to place above the streets of a city wires charged, or likely to be charged, with the deadly current of electricity, so that travelers along the highways may not be injured by defective appliances." *Mitchell v. Electric Co.,* 129 N. C., 166; *Hicks v. Telephone Co.,* 157 N. C., 519; *Harrington v. Wadesboro,* 153 N. C., 437; *Shaw v. Public Service Corp.,* 84 S. E. R.,1010.

The case of *Parker v. Electric Ry. Co.,* 169 N. C., 68, is easily distinguishable from the present case. In that case the evidence proved that the feed wire ran under a bridge maintained over a cut between the city of Charlotte and the village of Hoskins. The cars of the defendant ran underneath the bridge, and under it are its trolley wires and feed wires. The feed wire is about twelve inches below and underneath the bridge. The bridge was floored and was used to carry traffic. The Court said: "It would seem that the defendant in this case had exercised every possible care in the disposition of its wires and had no reason to expect that a thirteen-year-old boy would lie down on the bridge and endeavor to touch them," and so the Court distinguished that case from the *Burton*

case. The nonsuit was sustained (1) because the *evidence* showed that the defendant *had exercised every possible care in the disposition of its wires;* (2) because it had no reason to expect that a boy would lie down on the bridge and endeavor to touch the wires.

In the present case the defendant had permitted a chain, which might be charged with electricity, and which on the occasion of the injury was actually charged with electricity, to hang down a pole within easy reach of children on the public sidewalks. The place where the chain was hanging down was such a place as one might reasonably expect it probable that passers-by might come in contact with it. It was uncovered and not even a wooden block to intercept the electric current.

The judgment of nonsuit is set aside as to the Durham Traction Company and a new trial granted.

Reversed.

Cited: Butner v. Brown, 182 N. C. 700 (j); *Graham v. Power Co.,* 189 N. C. 391 (f); *Small v. Utilities Co.,* 200 N. C. 721 (g).

O. W. KERNER v. SOUTHERN RAILWAY COMPANY.

(Filed 17 November, 1915.)

1. Trials—Issues—Forms—Appeal and Error.

The form of issues submitted by the court to the jury is immaterial, and the refusal of the court to submit issues tendered and which are proper ones will not be held as error when the issues submitted relate to the evidence introduced at the trial and were sufficient for the determination of every phase of the controversy.

2. Negligence—Evidence—Railroads—Defective Locomotives—Other Locomotives.

Evidence introduced on the trial of the action should only be admitted when it has a reasonable tendency to throw light on the matters in dispute; and where the plaintiff sues to recover damages of a defendant railroad company alleged to have been caused by a spark from a defective locomotive, and the evidence is conflicting as to whether a spark from this particular engine could have been thrown the necessary distance at the time of the conflagration or under the conditions then existing, evidence tending only to show that another of the defendant's locomotives, at a subsequent time, had thrown sparks the necessary distance while passing the place is incompetent.

3. Evidence—Matters for Jury—Opinion of Witness.

Where the plaintiff seeks to recover damages for the alleged negligence of the defendant railroad company in destroying his manufactur-

ing plant by fire kindled by a spark from its passing train, and the evidence is conflicting as to whether the defendant's locomotive or the plaintiff's engine running the plant set out the fire, testimony by the plaintiff's witness that the fire could not have been caused by the plaintiff's engine is incompetent, being an expression of opinion upon a question for the jury to determine.

APPEAL by plaintiff from *Devin, J.*, at the May Term, 1914, of (95) FORSYTH.

Civil action tried upon certain issues, of which the following was the first.

1. Was the property of the plaintiffs described in the complaint set on fire and burned by sparks of the defendant's engine, as alleged in the complaint? Answer: No.

From the judgment dismissing the action, the plaintiff appealed.

Lindsay Patterson, Watson, Buxton & Watson, Manning & Kitchin for plaintiff.

Hastings & Whicker for defendant Snyder.

Manly, Hendren & Womble for defendant Southern Railway.

BROWN, J. The action is brought to recover damages for the destruction of the plaintiff's factory in the town of Kernersville 15 April, 1912.

The plaintiff offered evidence tending to prove that a freight train of the defendant, with an engine in charge of John Snyder, was defective as to its spark arrester and was so unskillfully operated that it emitted large quantities of live sparks which set fire to inflammable material in the plaintiff's factory and destroyed it. The defendant introduced evidence to the contrary. The jury found the first issue in favor of the defendant.

There are eighteen assignments of error, which we have carefully considered and find them to be without merit, and think that it is unnecessary to comment upon all of them. The plaintiff tendered certain issues which the court refused to submit. These issues are practically the same as those submitted, and we see no error in rejecting them.

Every allegation that the plaintiff set up in his complaint could (96) be presented to the jury by supporting evidence under the issues submitted by the court, and where that is the case the form of the issues is immaterial. *Albright v. Mitchell,* 70 N. C., 445; *Kirk v. Railway,* 97 N. C., 82.

The plaintiffs offered to prove by one Horah that two weeks after the fire, after dark, he and one of the plaintiffs were at the ruins of the burned factory and that a train was coming from Greensboro, and that as the engine passed it threw live sparks from its smokestack which fell

where the burned building formerly stood. This was excluded by his Honor. There was no offer to prove that it was the same engine as was operated by John Snyder and which it is claimed set the factory afire. This latter engine has been identified in the evidence as No. 123, attached to a freight train and in charge of the defendant Snyder as engineer. It is conceded that if the fire started from a spark from any of the defendant's engines, it was engine No. 123.

We think this evidence clearly incompetent. It is a universal rule that the evidence adduced should be directed and confined to matters which are the subject of dispute, or which have a reasonable tendency to throw light on the matters in dispute. To prove that the engine referred to, not 123, threw sparks two weeks afterwards on the site of the burned factory is no evidence that 123 threw sparks on the factory and set it afire on 15 April, 1912.

It is conceded that where a fatal fire has been set out from a designated or known engine, it is admissible to introduce evidence of other fires previously set out by the same engine for the purpose of showing its defective condition, but the rule has never been extended so as to permit evidence of sparks emitted by some other engine at some other time and place. *R. R. v. Smith,* 55 So., 871.

This Court, in *Ice Co. v. R. R.,* 126 N. C., 797, quoting from *Henderson v. R. R.,* 144 Pa. St., 461, said: "When the fire is shown to have been caused, or in the nature of the case could only have been caused by an engine, which is known and identified, the evidence should be confined to the condition, management and practical operation of that engine. Testimony tending to prove defects in other engines of the company is irrelevant and inadmissible." See, also, *Cheek v. Lumber Co.,* 134 N. C., 225; *Johnson v. R. R.,* 140 N. C., 581.

A very intelligent discussion of this question is found in *Cotton Co. v. R. R.,* 114 Fed., 133, 52 C. C. A., 95, where it was determined: That where the engine which alone could have set the fire is identified, testimony that other engines of the defendant set fires or threw sparks at other times is incompetent, in the absence of proof of similar conditions of the two engines, as well as similarity of conditions and manner of operation.

(97) The rule seems to be settled by the weight of authority that, when the fire has been kindled by sparks from a particular locomotive, which is identified, evidence of other fires kindled by different locomotives before and after the fire complained of is not admissible. *Bank v. R. R.,* 174 Ill., 36; 33 Cyc., 1376; 12 A. and E. Anno. Cases, 210.

The plaintiff excepted because his Honor declined to let witness Ballard state as a fact that the fire could not possibly have started

from a spark emitted from the smokestack and boiler of the plaintiff. This was one of the contentions of the defendant in enumerating the possible causes of the fire. It was the very question that the jury was empaneled to pass upon. One of the chief controversies on the trial was whether the fire was caused by sparks from the Snyder engine or from the plaintiff's own smokestack. Ballard's opinion on that subject was worth no more than any one else's. This Court has expressly held that such evidence is incompetent. *Gray v. R. R.*, 167 N. C., 433; *Deppe v. R. R.*, 154 N. C., 523.

These are the only two assingments of error commented upon in the brief; but we have examined the entire record, and find that there is

No error.

HOKE, J., concurs in result.

Cited: Moore v. R. R., 173 N. C. 312, 315 (2f); *Perry v. Mfg. Co.*, 176 N. C. 71 (2b); *Williams v. Mfg. Co.*, 177 N. C. 516 (2b); *Stanley v. Lumber Co.*, 184 N. C. 306 (3f); *Gentry v. Utilities Co.*, 185 N. C. 287 (3l); *Wilson v. Lumber Co.*, 186 N. C. 57 (3g); *Godfrey v. Power Co.*, 190 N. C. 32 (3g); *S. v. Carr*, 196 N. C. 132 (3f); *Heath v. R. R.*, 197 N. C. 544 (2b); *S. v. Hauser*, 202 N. C. 740 (3f); *Nufer v. R. R.*, 208 N. C. 56 (2f); *Patrick v. Treadwell*, 222 N. C. 5 (3g).

W. T. GRISSOM v. ROBERT M. GRISSOM ET ALS.

(Filed 17 November, 1915.)

Evidence—Transactions with Deceased—Trusts—Interpretation of Statutes.

The plaintiff, a son and heir at law of T., brings his suit to engraft a trust upon lands upon the grounds that his father purchased the lands with his own money and instructed another of his sons, R., to pay for them, but that R. had the conveyance only of a life estate made to his father, with the remainder to himself, of which the former, an ignorant man, remained unaware: *Held*, testimony of the plaintiff, after the death of his father and brother, is incompetent as to what occurred between them in relation to the transaction alleged, as he is a person interested in the result of the action, and testimony of this character is prohibited by the statute, Revisal, sec. 1631.

APPEAL by plaintiff from *Rountree, J.*, at the May Term, 1915, of NEW HANOVER.

Civil action. During the progress of the trial the court excluded certain evidence offered by the plaintiff, whereupon the plaintiff duly excepted and, in deference to the ruling of the court, submitted to a nonsuit and appealed.

(98) *K. C. Sidberry for plaintiff*
Bellamy & Bellamy for defendants.

BROWN, J. This action is brought by the plaintiff, who is the son of Thomas Grissom and his wife, Sarah, both deceased, against the defendants, who are the other heirs at law of said Thomas Grissom and his wife, Sarah, for the purpose of fastening a trust upon certain lands described in the complaint.

The plaintiff alleges that Thomas Grissom, being desirous of purchasing a certain piece of land, during the year 1866 sent his oldest son, Robert S. Grissom, to Wilmington to purchase the said land from one Thomas Douglass, and gave his son the money to pay for the same; that the latter purchased the land and, without his father's knowledge or consent, who was an ignorant man, unable to read and write, had the deed made to his father and mother for their lives and after their death to himself in fee simple.

During the trial the plaintiff was asked the following question: "Will you please tell the court and the jury what you know about your father buying a piece of land from a man named Douglass?" To this question the defendants objected upon the ground that the witness is a party and is claiming title to the property in controversy through Thomas Grissom and Robert S. Grissom, and cannot be examined, in his own behalf, against the defendants as to any personal transaction or communication between the witness and the deceased person or persons, where defendants derive their title and interest through said deceased person or persons, as such testimony is contrary to the provisions of section 1631 of the Revisal of North Carolina.

The court reserved its ruling on this objection, saying that he would hear the answer before passing on the objection.

The plaintiff replied that on or about the last part of October or the first of November, 1866, his father, Thomas Grissom, came to town and saw Mr. Thomas Douglass, and Thomas Grissom went back and told plaintiff's brother, Robert S. Grissom; that Thomas went back and he, the plaintiff, saw his father, Thomas Grissom, give his son, Robert S. Grissom, nine hundred dollars and heard him tell his son, Robert S. Grissom, to go to town and purchase the piece of land and have the deed made to Thomas Grissom and his wife, Sarah R. Grissom, in fee simple. That he saw Thomas give Robert the money to come to town

to pay for the place; that Thomas could neither read nor write, and he gave the money to Robert to come to town, and Robert came.

The Court, after hearing the answer, sustained the objection and ordered the answer stricken out, to which plaintiff excepted.

In *Harrell v. Hagan,* 150 N. C., 242, it is expressly decided that in an action to engraft a resulting trust on lands alleged to have been bought by O. at a public sale in behalf of H., both deceased, the (99) testimony of witnesses who are parties and interested in the result of the action, as to a conversation between O. and H., tending to establish the trust, is incompetent. In that case *Mr. Justice Walker* says: "Whether the construction by the Court of Revisal, section 1631, is the correct one, it is useless for us now to discuss. The true meaning of the statute and of the intent of the Legislature have been settled by this Court in well-considered opinions, which we are not disposed to disturb."

See, also, *Wilson v. Featherstone,* 122 N. C., 747; *Witty v. Barham,* 147 N. C., 479.

It being admitted that Robert S. Grissom is dead, and that some of the defendants claim under him, and that Thomas Grissom and his wife are likewise dead, this case falls squarely within those decisions.

Affirmed.

Cited: Brown v. Adams, 174 N. C. 498 (f); *Donoho v. Trust Co.,* 198 N. C. 766 (f).

CALVIN A. SHOOK v. JAMES A. AND JAMES M. LOVE.

(Filed 17 November, 1915.)

1. Equity—Reformation—Deeds and Conveyances.

Equity will not relieve against a deed for mistake of one of the parties unless it is shown that it was brought about by the fraud of the other; but it will reform a deed, in the absence of such a fraud, where the mistake of the parties is mutual, or is that of the draftsman entrusted to prepare the instrument.

2. Same—Timber Deeds—Registration—Evidence.

Where the grantor in a deed to lands has theretofore conveyed the timber thereon, with the usual provisions as to the time for cutting and removing it, but the deed to the timber is registered after that conveying the lands, evidence that the grantor informed the grantee in the deed to the lands, at the time of the conveyance, that there was an outstanding deed for the timber thereon expiring at a certain future time, is not alone sufficient upon which a court of equity will reform the deed

to the lands, upon allegation that by mutual mistake of the parties the timber was embraced in it, and thus avoid the title to the timber under the prior registered deed to the lands.

APPEAL by defendants from *Allen, J.*, at February Term, 1915, of ROBESON.

Civil action tried upon certain issues submitted to the jury, as follows:

1. Was it agreed between Hector Currie and C. A. Shook, at the time the deed to Shook was delivered, that the timber and rights theretofore conveyed to J. M. Love & Co. under the timber deed made to them should be excepted?

(100) 2. Was said clause omitted from deed by mutual mistake of the parties to said deed?

3. Was said clause omitted from said deed by mistake of the draftsman of said deed?

4. What was the value of the timber in dispute herein?

The court instructed the jury that there was no sufficient evidence to sustain an affirmative answer to the second and third issues and directed the jury to answer them "No." The defendants excepted. The jury answered the first and fourth issues in favor of the plaintiff. The defendants appealed.

McIntyre, Lawrence & Proctor for plaintiff.

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

BROWN, J. This action is brought by the plaintiff to recover damages of the defendant for cutting timber upon the lands described in the complaint and for an injunction prohibiting the cutting of same. The defendants answer and admit the cutting of the timber, claiming it as their own under a deed conveying the said timber, executed by Hector Currie (under who the plaintiff claims) to J. M. Love & Co., dated 23 February, 1911, with the privilege of three years from said date within which to cut and remove the said timber.

The defendants further answer and say that the plaintiff claims title to the land by virtue of an alleged deed from said Hector Currie, in regard to which these defendants say:

"That they are advised and believe that when said deed was executed it was understood and agreed between the said Hector Currie and the draftsman thereof, and the plaintiff, that the said deed should not include any of the timber rights or privileges that would in any way interfere with the rights, property and privileges given these defendants, as set forth in Exhibit 'A' hereto attached, but that by mutual

mistake of the parties, or the draftsman, the provisions embodying said agreement were omitted from said deed, although it was distinctly understood and agreed that the timber described in Exhibit 'A' was not sold by said deed, as it had already been sold, and was not to be conveyed;

"That the real transaction between the plaintiff and the said Hector Currie was a purchase of the lands described in the first paragraph of the complaint, subject to the rights of these defendants, as expressed in Exhibit 'A,' and that they are advised and believe that the same having been omitted from said deed by mutual mistake of the parties, or of the draftsman, said plaintiff paid no value for so much of the property included in said deed which is included in Exhibit 'A,' and is not an innocent purchaser for value therefor."

The defendants then pray for reformation of the deed so as to (101) omit the timber conveyed to them by the aforesaid deed of 23 February, 1911. The power of a court of equity to reform written instruments so as to speak the real contract of the parties is beyond question, but the power is exercised along well-known lines. An instrument will not be reformed because of the mistake of one of the parties unless brought about by the fraud of the other, but will be reformed where the mistake is mutual upon the part of all the parties, or when it is the mistake of the draftsman who is entrusted to prepare the instrument.

The testimony in this case tends to prove that the deed under which the defendants claim the timber was executed on 23 February, 1911, and was recorded 4 January, 1913. The said deed conveys to the defendants the timber upon the land described therein, with the right to cut and remove the same within three years from said date. The deed under which the plaintiff claims was executed by Currie 17 November, 1911, and was recorded prior to the deed under which the defendants claim.

There is no evidence in this record which tends to prove that at the time when the deed was made from Currie to the plaintiff it was the intention of the parties to the instrument to except from its operation the estate in the timber which had been previously conveyed to these defendants. There is evidence that Currie told the plaintiff that he had sold the timber to Love with the privilege of cutting and removing it up to about 1 January, 1913. The deposition of Currie tends to prove that there was no mutual mistake in the preparation or the execution of this deed. Both parties understood that the timber was to be exempted up to that date or thereabouts.

The testimony goes on to prove that Currie did not deem it necessary to put in the deed that the timber was exempted, because the plaintiff knew of it. The whole trade seems to have been based upon the idea

that the plaintiff was not to have the right to stop the cutting of the timber until after 1 January, 1913, or thereabouts. The fact that the sale of the timber to the defendants was discussed by the plaintiff and Currie is no evidence that a reference to it in the deed was omitted by mutual mistake. *Helms v. Helms,* 135 N. C., 164.

There does not seem to be any purpose upon the part of the parties to the deed to specifically exempt the timber from its operation. It seemed to be simply understood that the plaintiff was not to interfere with the right of the defendants to cut and remove the timber up to that time. Nor does it appear that the failure to except the timber was due to any mistake on the part of the draftsman, who was a surveyor of forty years experience, and a man of long practice in the drawing of deeds. The testimony shows that here was no instruction given to
(102) the draftsman to except the timber, although he knew that it had been previously conveyed to Love. The draftsman, himself, testified:

"Currie phoned me about drawing the deed. All that Currie phoned me was that he had sold the land and wanted me to draw the deed, and that the timber had been sold. Currie did not tell me to whom he had sold the timber, or how long he had to cut or remove it, or what was to become of the timber after his time to cut and remove it had expired. Currie read the deed over to himself and then signed it. He was an intelligent man, had a good common education and wrote a good hand." The evidence tends further to prove that the plaintiff made no claim on the timber until after 1 January, 1913, and that up to that time he permitted the defendants to cut the timber without molesting them; in fact, he seems to have asserted no claim to it, but to have lived up to his contract up to that time.

It is the defendants' misfortune that they did not put their deed on record, as prudence should have dictated.

The judgment of the Superior Court is

Affirmed.

Cited: Allen v. R. R., 171 N. C. 342 (1f, 2f); *Bank v. Redwine,* 171 N. C. 566 (1g); *Strickland v. Shearon,* 191 N. C. 566 (1f); *Crawford v. Willoughby,* 192 N. C. 272, 273 (1f).

M. G. DALRYMPLE v. T. W. COLE.

(Filed 17 November, 1915.)

1. Deeds and Conveyances—Husband's Deed—Homestead—Dower—Joinder of Wife.

Where a husband conveys his land without having his wife join in the deed, the grantee acquires the land free from the right of the wife to a homestead, unless the same has been laid off therein to the husband (Const., Art. X, sec. 8; Revisal, sec. 686), but subject to the wife's right of dower, should she survive him.

2. Same—Contracts—Value of Dower—Trials—Questions for Jury—Judgments.

Where a husband has contracted to convey his lands for a certain consideration, and he has failed of performance thereof by reason of the refusal of his wife to execute the deed with him, and the purchaser seeks in his action to enforce the performance of the contract, diminished by the wife's interest in the lands, it is proper that the question of the value of this interest be left to the jury and the purchase price accordingly diminished; and as this interest is only the value of her inchoate right of dower, it is reversible error for the trial judge to exclude from the consideration of the jury the value of this inchoate right and substitute the value of the homestead right, when the homestead has not been laid off to the husband, and there is no lien by judgment on the lands.

3. Same—Mortgages.

Where there is a mortgage on the lands of the husband executed properly by both husband and wife, and there is also a lien by judgment thereon, and the husband has contracted to sell these lands free from encumbrances and pay off the judgment out of the purchase money: *Held*, the execution of the mortgage by the wife releases both her homestead and right of dower to the mortgagee, and as the lien of the judgment has been agreed to be paid out of the purchase money, the purchaser is entitled to judgment that these liens be paid out of the purchase price and the lands be conveyed subject to the wife's inchoate right of dower, the value of which to be ascertained by a jury and deducted from the purchase price.

4. Deeds and Conveyances — Husband's Deed — Mortgagee—Contracts—Dower—Tender—Payment into Court—Judgments.

Where the husband has agreed to convey his lands free from encumbrances for a certain price, and there are liens by mortgage thereon, and his wife has refused to join in the conveyance, it is not required that the purchaser, in his action for specific performance, pay the sum agreed upon into court; for it is a sufficient tender when he alleges in his complaint that he was ready, willing and able to do so upon his getting the title for which he had contracted.

APPEAL by both parties from *Adams, J.*, at September Term, (103) 1914, of MOORE.

George W. McNeill and U. L. Spence for plaintiff.
Hoyle & Hoyle, H. F. Seawell and R. L. Burns for defendant.

PLAINTIFF'S APPEAL

CLARK, C. J. This case was before this Court on demurrer to the complaint, *Dalrymple v. Cole,* 156 N. C., 353. The defendant on 15 October, 1910, contracted in writing for a valuable consideration to make to plaintiff a good and sufficient deed of conveyance within ninety days for the land set out in the complaint, with covenants of warranty, upon the payment to defendant of $1,400 purchase money. The plaintiff within ninety days demanded the deed and alleged that he tendered the said sum. The jury found upon issues submitted that at the time of the tender of the purchase money and the demand for the deed there were mortgages outstanding upon the property executed by defendant and wife and also a docketed judgment for $100, all of which are liens upon the property.

The plaintiff thereupon tendered a decree that the defendant should execute to the plaintiff a good and sufficient deed in fee simple for the land resecribed in the complaint, with the usual covenants of warranty and relieved of all encumbrances, upon the plaintiff paying into court the contract price of $1,400 and interest thereon from 14 January, 1911, said amount to be applied first to the payment of said mortgages and the judgment and interest which had been found to be a lien against said land, and by the sum of $125.65 which the plaintiff had paid on said purchase money, and further by the "present value of the inchoate right of dower of the wife of the defendant," as damages for
(104) failure of title to that extent, unless said defendant shall in the meantime procure his wife to join in the execution of said deed with her privy examination duly taken; with further provision that the defendant make reasonable effort to procure his wife to execute said deed, and if she refuse to do so that then "the value of the inchoate right of dower" should be assessed by a jury at the next term.

The plaintiff assigns as error that the court struck out the words "inchoate right of dower" in both places and inserted in lieu thereof the words "except the homestead right."

The question presented is whether the constitutional requirement of the privy examination of the wife to the conveyance of the homestead is requisite except when the homestead has been allotted. This Court has repeatedly held that it is not. The homestead not having been allotted, and there not being any judgment under which it should be allotted, for the defendant answers that it was agreed that the judgment (which was for $100) should be paid out of the purchase money, there was no homestead which required the joinder of the wife. Her

joinder was required to release her inchoate right of dower only, which might or might not be of greater value than the interest in the homestead, if it had been allotted.

In *Mayho v. Cotton,* 69 N. C., 292, it was held that the failure of the wife to join in the conveyance of the tract of land in question was immaterial so far as the homestead is concerned, because, said the Court, "Section 8, Art. X of the Constitution applies only to a conveyance of the homestead after it has been laid off." To same purport, *Hager v. Nixon,* 69 N. C., 108. These decisions are almost an contemporary construction of the Constitution.

In *Bruce v. Strickland,* 81 N. C., 267; *Smith, C. J.,* held that the husband might convey his land, except where there is a dower right, without the joinder of his wife, unless the homestead had been allotted.

In *Hughes v. Hodges,* 102 N. C., 242, the authority of *Mayho v. Cotton, supra,* was recognized and followed, though the Court was inclined to somewhat modify it (in deference to the decision in *Adrian v. Shaw,* 82 N. C., 474), where the owner of land being embarrassed, his land was subject to be sold to satisfy a lien (p. 248). But *Adrian v. Shaw* has since been overruled, Revisal, 686, and the authorities construing that section. In *Hughes v. Hodges,* 102 N. C., 246, *Avery, J.,* for the Court, says: "A landowner who is not in debt may convey his land that has never been allotted to him as a homestead, without the joinder of his wife in the deed, subject only to her right of dower, if she survive him, but free from any restriction growing out of the provisions of section 8, Art. X of the Constitution," and on p. 247 he quotes with approval from *Mayho v. Cotton.* "Neither is it material that the wife of the defendant assent to receiving a home- (105) stead in the swamp place. Section 8, Art. X of the Constitution, applies only to a conveyance of the homestead after it is laid off."

In *Scott v. Lane,* 109 N. C., 154, it was held that when no homestead has been allotted and there are no judgment liens under which a homestead might be set apart preliminary to a sale, the owner can convey his land and pass the entire interest therein, including the homestead right (except the inchoate right of dower, should she survive him), without the wife joining in the conveyance.

In *Fleming v. Graham,* 110 N. C., 374, the Court stated: "In *Mayho v. Cotton* it is said 'section 8, Art. X of the Constitution applies only to the conveyance of the homestead after it is laid off.' This is cited and approved in *Hughes v. Hodges,* 102 N. C., 236, 247, with some reservations, in which it is said that though no homestead has been allotted, such conveyance cannot be made by the husband without the assent of the wife, if there are judgments against him which constitute a lien upon the land and upon which executions might issue

and make it necessary to have his homestead allotted." If this modification is valid since the adoption of Revisal, 686, yet it would have no application in this case, since there was no judgment outstanding save that of $100, which the defendant avers that it was agreed should be paid out of the purchase money.

Though *Fleming v. Graham, supra,* was questioned in some subsequent cases, it has been recognized as the law since the enactment of chapter 111, Laws 1905, now Revisal, 686, which has been uniformly followed by the Court since its adoption as the correct construction of the Constitution, sec. 8, Art. X.

In *Cawfield v. Owens,* 130 N. C., 644, the Court said: "The only safe rule as to the meaning of section 8, Art. X of the Constitution must be deduced chiefly from the two cases last cited, *Mayho v. Cotton,* 69 N. C., 289, and *Hager v. Nixon, ib.,* 108. When there is no creditor there is no reason for restricting the owner in the sale of lands not allotted as a homestead, by any construction placed upon that section, because the whole plan of homestead exemption was framed for the purpose of affording protection against debt. But it does not follow from the mere fact that a man owes debts that section 8, Art. X of the Constitution is to be construed to disable him from conveying his land without the joinder of his wife, unless the deed was executed with intent to defraud his creditors and no homestead has been allotted to him, or unless the land conveyed to him is subject to the lien of a judgment or of a mortgage reserving the homestead right, that cannot be enforced without allotting a homestead in order to ascertain and subject to sale the excess." The mortgages in this case do not reserve the homestead right.

(106) In *Joyner v. Sugg,* 132 N. C., 593, 594, *Mr. Justice Walker,* speaking for the Court, says: "But we have said, and we now repeat, that the prohibition of section 8, Art. X of the Constitution, against the conveyance of the husband without the voluntary signature and assent of the wife, to be signified by her privy examination, was not intended to become effective until the homestead is actually allotted to the owner of the land. It is provided by that section that no owner of a homestead shall convey it without the assent of his wife, and this necessarily implies that there has been an actual allotment, as no one can be said to be the owner of that which does not exist. The right to the homestead always exists and is guaranteed by the Constitution, but the homestead itself cannot come into existence until it has been 'selected by the owner' of the land and actually allotted, and thereby identified as his homestead. *Mayho v. Cotton* and *Hughes v. Hodges, supra.*

"This very question was involved in *Hager v. Nixon,* 69 N. C., 108, and the meaning of the words of the Constitution, 'owner of a homestead,' as used in the several sections above quoted, was clearly defined. In that case the husband died without owing any debts and without having had any homestead set apart to him. His wife and minor children applied for the allotment of a homestead, and the Court decided that section 5, by which it is provided that 'if the owner of a homestead die leaving a widow' she shall have the benefit of the homestead during her widowhood, meant that the homestead must have been allotted to the husband and he must in that way have become the 'owner of a homestead' before she could have the benefit of it. 'It is implied,' says the Court, 'that the ancestor had been the owner of the homestead, by which, in this connection, must be meant a part of his property set apart and designated as exempt, and not merely land occupied and owned by him.' *Ibid., p.* 110

"The words 'owner of a homestead' are used in section 8, by which the sale of the homestead without the assent of the wife is forbidden, and as the Court has said in *Hager v. Nixon, supra,* that the same words in all of the sections must of necessity receive the same construction, the restraint of alienation imposed by section 8 can apply only to a homestead which has been actually allotted. See, also, *Bruce v. Strickland,* 81 N. C., 267. The prohibition of that section cannot therefore affect this case, as there had been no allotment of the homestead when Blaney Joyner executed the deed of trust to Allen Warren."

Besides the above very full and clear exposition of the constitutional provision, the defendant and wife, by executing the mortgage deeds referred to, had already conveyed their homestead in the land in question within the meaning of section 686 of the Revisal, and (107) the defendant cannot now be heard to claim a homestead therein.

In *Rodman v. Robinson,* 134 N. C., 505, it is said: "As to the homestead right, it was not necessary for the wife to join in the conveyance, because the answer admits that no homestead had been allotted in this land. *Mayho v. Cotton,* 69 N. C., 289, *approved in Joyner v. Sugg,* 132 N. C., 589."

In *Sash Co. v. Parker,* 153 N. C., 130, where the whole subject of the homestead is reviewed in the light of Revisal, 686, the same construction as above is sustained, the Court saying: "According to the true intent and meaning of the Constitution, the land must be selected by the owner and allotted before it becomes exempt." It follows that until it is allotted it is not exempt, and it is not necessary for the wife, so far as the homestead is concerned, to join in the conveyance, though she must join to release her inchoate right of dower.

In *Davenport v. Fleming,* 154 N. C., 291, *Hoke, J.,* cites with approval the above cases of *Sash Co., v. Parker,* 153 N. C., 130, and *Joyner v. Sugg,* 132 N. C., 580. In *Dalrymple v. Cole,* 156 N. C., 353 (which is this case on its former hearing), *Walker, J.,* cited with approval the above rulings in *Mayho v. Cotton,* 69 N. C., 293; *Hager v. Nixon, ib.,* 108; *Hughes v. Hodges,* 102 N. C., 236; *Joyner v. Sugg,* 132 N. C., 580; *Davenport v. Fleming,* 154 N. C., 291, and *Fleming v. Graham,* 110 N. C., 374.

In *Simmons v. McCubbin,* 163 N. C., 412, *Walker, J.,* said: "It has been held for a long time and in many cases that the wife's joinder is not required (in the conveyance of the homestead) unless there is a judgment docketed and in force which is a lien upon the land, or unless the homestead has beeen actually set apart. Constitution, Art. X, sec. 8; *Mayho v. Cotton,* 69 N. C., 289; *Hughes v. Hodges,* 102 N. C., 249; *Scott v. Lane,* 109 N. C., 155; *Joyner v. Sugg,* 132 N. C., 580; *Rodman v. Robinson,* 134 N. C., 505; *Shackleford v. Morrill,* 142 N. C., 221."

In *Power Corporation v. Power Co.,* 168 N. C., 223, it is said: "The joinder and privy examination of the wife is not necessary to a conveyance by the husband of his realty (subject to the contingent right of dower) except in a deed of his duly 'allotted' homestead. Constitution, 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."

Our conclusion is, both upon the authorities and the reason of the thing, that the Court correctly held in *Mayho v. Cotton,* 69 N. C., 294, that "section 8, Art. X of the Constitution applies only to a conveyance of the homestead after it has been laid off." This is the plain meaning of the Constitution and has been the uniform ruling from
(108) *Mayho v. Cotton,* 69 N. C., 294, down to *Power Corporation v. Power Co.,* 168 N. C., 223. The utmost this Court at any time has deviated from that proposition has been in those cases where there was a docketed judgment under which the homestead was required to be laid off. That, however does not affect this case, as the only judgment here is one for $100, which the defendant allges that it was agreed should be paid off out of the purchase money, and the wife's joinder in the mortgages released both the homestead and her dower as to those liens. The answer does not set up the homestead as a defense in this action, and the defense would not have availed if it had been pleaded.

We are of opinion that the defendant could make a good and valid conveyance so far as the homestead interest is concerned without the joinder of his wife, but that her joinder is necessary to release her inchoate right of dower. In modifying the judgment tendered by the plaintiff there was

Error.

DEFENDANT'S APPEAL

CLARK, C. J. The defendant's appeal requires no consideration beyond the exception that the tender was not sufficient as the jury found under the charge of the court. We need not consider the exceptions as to the sufficiency of the tender, for the property was encumbered by liens beyond the contract price and it was not necessary that the plaintiff should pay $1,400 in court and lose the interest thereon during the five years that this litigation has been pending, while the interest was accumulating upon the liens. It was the duty of the defendant to have paid off and discharged these liens, and when the plaintiff alleged their existence and that he was ready, willing and able to pay the $1,400 into court the defendant should then and there have accepted the offer. *Hardy v. Ward,* 150 N. C., 385; *Trogden v. Williams,* 144 N. C., 192.

Besides, as the defendant's wife refused to join in the conveyance, and it was necessary for the jury to ascertain the value of her inchoate right of dower, the plaintiff could not know until that was done the amount he should pay in, even if there had been no outstanding liens and encumbrances.

The defendant is in default by the failure of his wife to join in the deed releasing her right of dower and in his failure to pay off the liens. He is in no condition to object that the plaintiff did not pay $1,400 in court until he could give a good and sufficient deed to the premises with a release by the wife of her inchoate right of dower or a deduction for the value thereof duly ascertained.

Upon the facts of this case no more was necessary on the part of the plaintiff than the tender in his complaint of the amount of the purchase money upon the cancellation of the liens and the (109) tender of a good and sufficient deed on the part of the defendant with covenants of warranty. The judgment of the court that the defendant should specifically perform upon the plaintiff now paying into court the $1,400 purchase money with interest thereon from 13 January, 1911 (the expiration of the ninety days), was correct. It is not necessary to consider the exceptions, therefore, as to the actual manner and mode of the tender of the $1,400 before that time.

No error.

Cited: Schwren v. Falls, 170 N. C. 252 (1g); *Wallin v. Rice,* 170 N. C. 420 (1j); *Watters v. Hedgpeth,* 172 N. C. 312 (1g); *Thomas v. Sanderlin,* 173 N. C. 335 (1j); *Kirkwood v. Peden,* 173 N. C. 463 (1g); *Hall v. Dixon,* 174 N. C. 320 (1l); *Dalrymple v. Cole,* 181 N. C. 287 (S. c., 1f); *Cheek v. Walden,* 195 N. C. 755 (1g); *Ins. Co. v. Knox,* 220 N.C. 739 (j); *Cleve v. Adams,* 222 N. C. 214 (1l).

J. P. LEWIS v. THE TOWN OF PILOT MOUNTAIN AND COMMISSIONERS.

(Filed 17 November, 1915.)

Municipal Corporations—Paving—Assessments—Legislative Authority—Vote of People.

A municipal corporation may assess the owners of property along the street for paving the street, under legislative authority, without submitting the question to a vote of the town. Upon the question of notice, estoppel, and injunction, see *Marion v. Pilot Mountain, post,* 118.

APPEAL by defendants from order of *Justice, J.,* continuing the injunction to the hearing.

S. P. Graves and W. F. Carter for plaintiff.

W. R. Badgett, Watson, Buxton & Watson for defendants.

CLARK, C. J. This case is almost identical in every respect with *Marion v. Pilot Mountain, post,* 118, to the opinion in which we refer as the opinion in this case.

It is not necessary that there shall be a town election or that the lot owners shall vote in favor of assessing their lots for paving the sidewalk and streets in front of their property. This power is conferred by the Legislature in the amendment to the town charter. The plaintiff had the fullest and amplest notice of the order to pave his sidewalk and that if he did not pave it the city would do it, and he saw the work of paving being done, and during all this time he made no objection either by appearing before the town commissioners or otherwise.

Neither did he pay his assessment before seeking the injunction, Revisal, 2855, nor does it appear that the action of the board was arbitrary and oppressive or that the assessment is excessive. The commissioners of the town are vested with the discretionary power (110) to order the paving, and in the absence of oppression or an abuse of discretion the court should have dissolved the restraining order. *Rosenthal v. Goldsboro,* 149 N. C., 128; *Hilliard v. Asheville,* 118 N. C., 845; *Raleigh v. Peace,* 110 N. C., 32; *Wilson v. Phillippi,* 39 W. Va., 75.

Reversed.

HOKE, J., concurs in result. WALKER J., dissents.

WILLOUGHBY LYNCH v. C. R. JOHNSON ET ALS.

(Filed 17 November, 1915.)

Bankruptcy—Trustee's Title—Purchaser for Value—Registration—Notice —Interpretation of Statutes.

Since the amendment to the Bankrupt Act of 1910 the trustee of a bankrupt acquires the bankrupt's property on the same basis as creditors and purchasers for value against unrecorded instruments; and where the lands have theretofore been conveyed to the bankrupt to be held in trust for himself and another purchaser, the title taken to himself, and he had forwarded a deed to the other person for his part of the lands, but which deed was not received or recorded, the purchaser at the trustee's sale acquires a good title, though he was aware of the previous transaction.

APPEAL by defendants from *Whedbee, J.*, at April Term, 1915, of TYRRELL.

T. H. Woodley and Aydlett & Simpson for plaintiff.
Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C. J. In 1896 C. R. Johnson purchased a tract of land in Tyrrell from W. E. Shallington. The plaintiff Lynch alleges in his complaint that he paid half of the purchase money under an agreement with Johnson that he would hold half of the land in trust for the plaintiff, the deed for the entire tract being taken in Johnson's name. In 1911 Johnson was adjudged a bankrupt in Virginia and the defendant H. W. Davis was appointed trustee in bankruptcy. The trustee, by order of Court, advertised the lands for sale and they were purchased by the Juniper Corporation. The plaintiff alleges that at the time of such purchase the Juniper Corporation had knowledge of his claim. This was denied by the defendants, but the jury found with the plaintiff on that issue. Johnson, as witness for the plaintiff, testified that shortly after the purchase from Shallington he executed a deed to the plaintiff for a half interest in the land and placed the same in the postoffice in a stamped envelope bearing his return address, and heard nothing more from it. The plaintiff testified that he had (111) never received the deed.

Assuming the facts to be as contended by the plaintiff, the defendants acquired a good title to this property. (1) Under the Bankrupt Act as amended 25 June, 1910, the trustee in bankruptcy acquired this property free from the claims of the plaintiff. (2) Regardless of the title acquired by the trustee, the defendants took the property free from any lien or claim of the plaintiff.

It is settled by the Connor Act, Rev., 980, by its express terms, and the numerous decisions thereunder cited in Pell's Revisal, 980; *Burwell v. Chapman,* 159 N. C., 211, that even if Johnson had executed and delivered the deed for the half interest in the land to the plaintiff Lynch, the latter having failed for any reason to record the same, its subsequent purchaser from Johnson, or under execution sale against him, even with notice of the outstanding conveyance to Lynch, "however full and complete" such notice might be, would acquire the title. The evidence for Johnson that he mailed the deed to Lynch and the latter's evidence that he did not receive it cannot change this.

Under the amendment to the Bankrupt Act, 25 June, 1910, the trustee in bankruptcy acquires exactly the same title as any purchaser for value. The United States Supreme Court in *Mfg. Co. v. Cassell,* 201 U. S., 304, held that "The trustee in bankruptcy is vested in no better right or title to the property than the bankrupt had when the trustee's title accrued." The amendment to the Bankrupt Act, 25 June, 1910, was enacted to change this, and the effect has been to put trustees in bankruptcy on the same basis as creditors and purchasers for value as against unrecorded instruments. This has been held in many cases in the Federal Court, among them *Mfg. Co. v. Arthur* (C. C. A.), 220 Federal, 846; Collier on Bankruptcy (9 Ed.), 658, 662, 999, citing many cases in the notes.

This precise point has been fully discussed in *Hinton v. Williams, post,* 115, to which we refer. The court should have given the defendants' prayer for instruction that "On all the evidence and admissions in the cause the plaintiff was not entitled to recover any interest in the land, and the jury should answer the sixth issue 'No'."

Error.

Cited: Lynch v. Johnson, 171 N. C. 611 (Petition to rehear dismissed); *Dye v. Morrison,* 181 N. C. 311 (f); *Roberts v. Massey,* 185 N. C. 166 (l).

(112)

SANTA FELIA v. W. G. BELTON.

(Filed 17 November, 1915.)

1. Intoxicating Liquors—Claim and Delivery—Criminal Law—Judgments.

Where the plaintiff has been convicted of violating section 7, ch. 97, Laws of 1915, for unlawfully receiving and having in his possession 40 gallons of wine to serve at the table of his boarding house, though no extra charge is made for the wine, and from this judgment he has not

appealed, he cannot in a civil action of claim and delivery obtain possession of the wine from an officer having it in his custody under the order of court to destroy it, and it is the duty of the officer to do so, under the judgment in the criminal action not appealed from.

2. Same—Custodia Legis—Interpretation of Statutes.

Where the defendant in a criminal action has been convicted of unlawfully having 40 gallons of wine contrary to the provisions of chapter 97, Laws of 1915, and the wine is in the hands of an officer of the court, it being *in custodia legis*, the defendant may not recover it in a civil action against such officer; nor will the courts adjudicate that the officer deliver the wine to the plaintiff, for as the officer would act in violation of the statute in voluntarily doing so, the courts will not compel him.

APPEAL by plaintiff from *Cline, J.*, at August Term, 1915, of SURRY.

J. H. Folger for plaintiff.

Attorney-General Bickett and W. F. Carter for defendant.

CLARK, C. J. This is a claim and delivery, begun before a justice of the peace, for 40 gallons of wine. On appeal to the Superior Court the following facts were agreed: On 1 July, 1915, the plaintiff received in one package from the railway company at Mount Airy, N. C., vinous liquor to the amount of 40 gallons, said liquors containing 12 per cent of alcohol. On 12 July, 1915, a warrant was issued against said Felia for receiving a package of more than a quart of vinous liquor in violation of section 2, ch. 97, Laws 1915. He was arrested and the liquor seized. On trial before the recorder he was found guilty and fined. He paid the fine and costs and was discharged. He was the keeper of a boarding house and the wine was used by him on his table by his boarders at every meal, though no extra charge was made the boarders for the wine. In that action the court found as a fact that there was no evidence going to show that the defendant had the wine for the purposes of sale. The recorder, as a part of his judgment, directed the officer to destroy the wine. Thereafter the plaintiff herein (the defendant in the criminal action) instituted this suit for possession of the said wine against U. G. Belton, the officer who had the same in possession, who gave a replevy bond and retained possession of the wine. On appeal to the Superior Court judgment upon the case agreed was rendered (113) that the plaintiff was not entitled to recover possession of the wine and dismissing the action; and further directing that the defendant as the officer of the law should execute the judgment in the criminal action by disposing of the wine or destroying the same.

It was also agreed as additional facts that a part of the wine in question had been used upon the table in the plaintiff's boarding house be-

fore any seizure and, but for the seizure, the balance would have been used in the same way; that the plaintiff, his family and boarders are Italians and that the wine was served on the table in connection with the regular meals for dinner and supper, daily. Laws 1915, ch. 97, sec. 7, provides: "It shall be unlawful for any person, firm or corporation to serve with meals, or otherwise, any spirituous, vinous fermented or malt liquors or intoxicating bitters where any charge is made for such meal or service." Under this section the plaintiff in this action was found guilty in the criminal action, fined, and the liquor ordered to be destroyed. He did not appeal from the judgment, in that case and cannot now in a civil action seek to set aside and disregard such judgment.

It does not appear whether the liquor was shipped to Mount Airy from a point within the State or from without the State, nor does it make any difference in any aspect. The consignee had taken the 40 gallons of wine out of the depot, had opened the original package and was using it illegally in violation of the statute. Moreover it is now by order of the court *in custodia legis.*

Besides, chapter 97, Laws 1915, makes it unlawful for any one to deliver, in any one package, or at any one time, any spirituous or vinous liquors to any person in a quantity greater than one quart and for any person to receive a greater quantity than one quart of spirituous or vinous liquors at any one time. If the defendant Belton should voluntarily deliver this wine to the plaintiff he would be indictable and the plaintiff, Felia, would also be indictable. Certainly the court cannot by judgment in this case direct the officer to do an illegal act or permit the plaintiff to commit an indictable offense. Laws 1915, ch. 97, sec. 13, would make both the plaintiff and defendant guilty of a misdemeanor, and the court cannot dispense from that liability.

The judgment of the court in the criminal action to destroy the vinous liquor was unappealed from and must be enforced.

Affirmed.

Cited: Skinner v. Thomas, 171 N. C. 103 (d); *Skinner v. Thomas,* 171, N. C. 106 (j).

(114)

T. J. FINCH, TRUSTEE OF P. S. CECIL, v. P. S. CECIL AND WIFE, ABBIE W. CECIL.

(Filed 17 November, 1915.)

1. Husband and Wife—Estates by Entireties—Creditors—Fraud.

Where a conveyance of lands is made to the husband and wife in entireties, expressing a valuable consideration, it will not be set aside at the suit of the husband's trustee in bankruptcy, alleging it was purchased with the money of the husband, while insolvent, for the purpose of defrauding his creditors in having it conveyed to him and his wife, there being no evidence of the insolvency or fraud of the husband at the time of the deed, and evidence that he was then indebted to his wife.

2. Same—Retaining Property—Interpretation of Statutes.

A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. Revisal, sec. 962.

APPEAL by plaintiff from *Justice, J.*, at August Term, 1915, of DAVIDSON.

Emery E. Raper and Walser & Walser for plaintiff.

L .A. Martin and Phillips & Bower for defendants.

CLARK, C. J. This is an action by the trustee in bankruptcy of P. S. Cecil to subject certain lands now held in entirety by the said bankrupt, P. S. Cecil, and his wife to payment of the debts due by P. S. Cecil. The plaintiff alleges that said P. S. Cecil was insolvent for more than two years before he failed, and that during that time he took deeds in the joint names of himself and wife for said lands, which were paid for by said P. S. Cecil alone, and that the title was thus taken in entirety to hinder and delay his creditors, and asking that the said Cecil and wife be adjudged to hold said lands in trust for his creditors and that the same be sold by the plaintiff under the orders of the court. The defendants allege that P. S. Cecil was not insolvent at any time prior to the bankrupt proceeding, and that the said deeds were not voluntary, but were made in the usual course of dealing, without any purpose of delaying, hindering or defeating creditors.

Taking the evidence in the most favorable light, the plaintiff failed to show insolvency on the part of P. S. Cecil, fraud or intention to hinder and delay his creditors. The deeds in question, according to the evidence, were based on good consideration. Even if the deeds were voluntary the joining of the wife as grantee would not make them

fraudulent if sufficient property was retained to fully satisfy the then creditors of P. S. Cecil. Revisal, 962.

The plaintiff's evidence showed that both defendants owned some property and that in one case the land was bought by the husband (115) and wife jointly, she being made one of the grantees, it would seem, because, according to the evidence, her husband was indebted to her.

There being no sufficient evidence to contradict the express terms of the deeds, which recite that they are based on a valuable consideration, or to show that the grantors therein executed them through fraud, or that the defendants participated in any fraud, and in the absence of evidence that any of said lands were conveyed to defendants to hinder, delay, or defeat the rights of creditors, and the plaintiff having failed to establish the insolvency of the defendant P. S. Cecil, or to show that he did not retain property sufficient and available to satisfy his then creditors, the judgment of nonsuit was properly granted.

Affirmed.

Cited: Hood, Comr. of Banks, v. Cobb, 207 N. C. 130 (g).

W. E. HINTON ET ALS. v. D. E. WILLIAMS.

(Filed 17 November, 1915.)

Vendor and Purchaser — Conditional Sales — Registration — Bankrupt — Court—Trustee—Interpretation of Statutes.

By the amendment to the Bankrupt Act enacted by Congress in 1910 the title to the bankrupt's property is vested in his trustee, "with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," and such trustee coming, therefore, within the provisions of Revisal, sec. 938, conditional sales contracts, reserving title in the vendor, are not good as against such trustee, when the writing has not been recorded until after the title has passed to him. Hence, when the vendor of the bankrupt, reserving title to the property sold, does not have his paper-writing recorded until after the property has passed to the trustee in the bankruptcy proceedings, the purchaser at the sale acquires a good title.

APPEAL by plaintiffs from *Justice, J.,* at January Term, 1915, of PASQUOTANK.

Action for the alleged conversion of certain personal property, i.e., one skidder and two trucks or log cars. C. L. & R. L. Hinton sold and delivered to the Camden Timber Company said skidder, four trucks

and some miles of railroad iron, under a written agreement, 21 June, 1912, "to be paid for about one-third cash, balance note, title to remain with vendor till all the note is paid in full." Three hundred dollars was paid in cash. This agreement was not recorded till 30 August, 1913, over fourteen months after date. In accordance with the agreement the Camden Timber Company executed two notes, one for $278.60 and one for $1,000, both dated 15 November, 1912, and due three and six months after date. On 8 July, 1913, the Camden Timber Company filed its petition in bankruptcy, including in its list of creditors holding securities, the following: "C. L. & R. L. Hinton, South Mills, N. C., two notes, $278 and $1,000, secured by contract reserving (116) title, for mill equipment and railroad track."

The Timber Company was adjudged a bankrupt and Ehringhaus and Spence were appointed trustees. On 16 August, 1913, these trustees filed a petition asking that they be empowered to sell all the property of the bankrupt, specifying among such property "a locomotive, a lot of rail, two skidding machines and other property." On that date the bankrupt court granted the order of sale, directing the property to be sold on Monday, 1 September, 1913. The agreement between the Timber Company and plaintiff was not recorded till after such order, to wit, on 30 August, 1913. The sales were reported to the court and confirmed 23 September, 1913, and the trustees delivered this property to the purchaser. This action was brought to recover its value of the purchaser.

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

CLARK, C. J. The sole question in the case is whether the vendors claiming under an unregistered conditional sale are entitled to recover the property from the purchaser at sale by the bankrupt's trustees. At the close of the testimony the defendant moved for a nonsuit, which was allowed, and the plaintiffs excepted.

The mortgage or conditional sale expressed the intention of the parties that title was to be retained by the Hintons until the purchase price was paid in full. Though the agreement was executed 21 June, 1912, it was not recorded till 30 August, 1913. In the meantime the Camden Timber Company had been adjudged a bankrupt, 8 July, 1913, and on 16 August the trustees in bankruptcy had been directed to sell the property at public sale on Monday, 1 September, 1913. The court adjudged that the purchasers at such sale took the property clear of any lien.

The plaintiffs contended that the mortgage, though unregistered, was good as between the parties and that the trustees in bankruptcy stood in the shoes of the bankrupt, and did not hold as a purchaser for value. In this State and some others it has been held that the failure to record a conditional sale precludes the seller from any lien on the property when it has passed into the hands of the trustee in bankruptcy, on the ground that the contract is void as to creditors until it is recorded, and that therefore the title passes to the trustee in bankruptcy discharged of any lien. *In re Tatum,* 110 Fed., 519; *In re Smith,* 132 Fed., 301; *In re Poore,* 139 Fed., 862.

In 1906 the Supreme Court of the United States, in *Mfg. Co. v. Cassell,* 201 U. S., 304, held that "The trustee in bankruptcy is vested
(117) in no better right or title to the property than the bankrupt had when the trustee's title accrued," and hence that where a conditional sale contract was not recorded before the adjudication in bankruptcy, the vendor's lien, being good as between the parties, was good against the trustees in bankruptcy.

In 1910 Congress, in order, no doubt, to avoid cases of fraud which arose under that decision, amended the Bankrupt Law, sec. 47 (a), clause 2, by adding thereto: "And such trustee, as to all property in the custody, or coming into the custody, of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." Chapter 412, sec. 8, Stat. at L. 840; U. S. Comp. Stat. Supp., 1912, p. 1493.

The decisions since the adoption of this statute hold that where the seller of property by conditional sale has failed to record his contract of sale where the State statute renders the contract invalid as to lien creditors or *bona fide* purchasers without registration, he has no remedy as against the trustee in bankruptcy to enforce the lien, but is a mere general creditor with a right to share in the assets of the estate. *In re Lumber Co.,* 197 Fed., 281; *In re Gehris-Herbine Co.,* 188 Fed., 502; *In re Basemore,* 189 Fed., 236; *In re Knitting Mills,* 190 Fed., 871; *In re Nelson,* 191 Fed., 233; *Bank v. Coats* (C. C. A.), 205 Fed., 618; Ann. Cas., 1913, E. 846.

Prior to the above amendment of 1910, under the ruling in *Mfg. Co. v. Cassell, supra,* a trustee in bankruptcy was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. He stood in the shoes of the bankrupt and had no greater right; and where under the State law, which was binding on the bankruptcy court, a chattel mortgage was

valid as between the bankrupt and the mortgagee with registration, but not against the purchasers, mortgagees or creditors, it was good against the trustee in bankruptcy. The amendment of 1910 changed this rule. This has been held in numerous cases in the Federal courts, among them *Bank v. Schade* (C. C. A.), 195 Fed., 188; *In re Osborn* (C. C. A.), 196 Fed., 257; *Milliken v. Bank* (C. C. A.), 206 Fed., 14; *Lumber Co. v. McEldowney* (C. C. A.), 207 Fed., 255.

Under the North Carolina statute unrecorded conditional sale contracts are not good against creditors and purchasers for value. Revisal, 983; *Blalock v. Strain,* 122 N. C., 283; *Clark v. Hill,* 117 N. C., 11.

The amendment of 1910 puts trustees in bankruptcy on the same basis. *Mfg. Co. v. Arthur* (C. C. A.), 220 Fed., 846; Collier (118) on Bankruptcy (9 Ed.), 658, 662, 999, citing many cases in the notes.

The court below properly held that the plaintiff vendor in an unrecorded conditional contract of sale could not recover the property or its value from the purchaser at such sale, when such conditional sale was not recorded until after the title passed to the trustees in bankruptcy.

The judgment of nonsuit is

Affirmed.

Cited: Lynch v. Johnson, 171 N. C. 612 (f); *Davis v. Robinson,* 189 N. C. 601 (f).

DANIEL MARION v. TOWN OF PILOT MOUNTAIN AND BOARD OF COMMISSIONERS.

(Filed 17 November, 1915.)

1. Municipal Corporations—Cities and Towns—Sidewalks—Paving—Assessments—Legislative Powers—Constitutional Law.

It is within the power of the Legislature to confer upon an incorporated town the authority to require property owners along the streets to improve the sidewalks in front of their property, in such manner as the commissioners of the town may direct, and, on failure to do so after ten days notice by the chief of police, to cause the work to be done either with brick, stone or gravel, or other material, in the discretion of the commissioners, and assess the cost against the property owner, add the same to his taxes, and collect it as other taxes are collected.

2. Same—Ordinances—Estoppel—Injunction.

Where an incorporated town has passed an ordinance under statutory powers conferred on it, requiring the property owners to pave the side-

walks along their lots with certain materials, and if not done after ten days notice, the town would have the work done and assess the property and collect the amount with other taxes from the owner of the lot, and it appearing in a suit of a delinquent owner of a lot to restrain the collection of the assessment, that he had been given eighteen months notice before the town had the paving done, was present at the time thereof, making suggestions as to how it should be done, and took no step in opposition until the bringing of his suit, but theretofore promised to pay the assessment, it is *Held*, not only is the assessment a valid one under the statute and ordinance, but that the plaintiff, by his acts and conduct, is estopped to deny its validity.

3. Injunction—Affidavit—Supreme Court—Municipal Corporations—Cities and Towns—Sidewalks—Paving.

Where a property owner seeks to enjoin the collection of an assessment on his property for the cost of paving a sidewalk of a street along his lot, the affidavits filed therein may be examined by the Supreme Court, and in this case it is held that the order should not have been continued to the hearing upon the conflicting evidence.

4. Municipal Corporations — Cities and Towns—Pavings—Assessments—Payment into Court—Statutes—Injunctions.

Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Revisal, sec. 2855.

(119) APPEAL by defendants from *Justice, J.*, at chambers in Winston, April, 1915; from SURRY.

By virtue of chapter 337, Laws 1913, Pilot Mountain was authorized to issue bonds. Section 8 of such act provides that every owner of a lot fronting or adjoining on a street in the town on which a sidewalk has been established shall improve said sidewalk in such manner as the commissioners of the town may direct, as far as the sidewalk extends along his lot, and on his failure to do so in ten days after notice by the chief of police to the owner of said lot, the commissioners may cause the same to be repaired or improved with either brick, stone, gravel, or other material, at their discretion, and the cost of said paying may be assessed upon the property of such delinquent and added to the taxes against the owner of said lot and collected in the same manner as other taxes.

After the passage of said act the board of commissioners of Pilot Mountain passed the following ordinance: "All owners of real estate in the boundaries herein set forth be and are hereby required and directed to pave their sidewalks in the material and of the width hereinafter set out in front or at the sides of their respective lots, and in such

manner as the board of commissioners may direct. The territory included in this ordinance is as follows: (Here follows a detailed description of the streets on which the sidewalks on both sides shall be paved.) Among the streets named is "Main Street, on both sides from a point even with the southwest corner of Clifton & Gordon's roller mill to the intersection of Stephens Street."

The ordinance specified the width of the pavement on certain streets should be ten feet, and on the others not less than four feet wide. On 7 January, 1914, the chief of police served on the plaintiff a notice to comply with said ordinance within the time specified therein. The plaintiff failing for nearly three months to comply with this notice, the commissioners caused the sidewalk abutting the property of the plaintiff within the district prescribed in the ordinance to be graded, and proceeded to put down sidewalks thereon, on both sides of Main Street in front of plaintiff's hotel and adjoining lots and in front of his warehouse. This sidewalk was laid according to the grade established by the engineer, and it is not denied by the plaintiff that the sidewalks were laid only within the district provided for in the ordinance.

This work was done after a notice and copy of the ordinance were served on the plaintiff, 7 January, 1914. The plaintiff failed and refused to comply, and on 28 March, 1914, the commissioners let the contract for the concrete sidewalk to George R. Martin, who was (120) the lowest bidder, at the contract price of 94½ cents per square yard, which includes all material and labor. After the work was completed, the commissioners made a demand upon the plaintiff for payment of the cost of said work, and on his refusal his lots were assessed for the above amounts, and upon nonpayment the assessment was handed the tax collector, who after notice and nonpayment advertised the property for sale at public auction at the courthouse door in Dobson on 5 April, 1915, to satisfy the assessments, amounting in the aggregate to $218.29, of which $165.59 was for the sidewalk in front of plaintiff's hotel fronting 280 feet on Main Street, and $52.70 for the sidewalk in front of his warehouse lot.

The plaintiff obtained a temporary restraining order, and on the return day of the same, before *Judge Justice,* the restraining order was continued to the hearing, and the defendants appealed.

S. P. Graves and W. F. Carter for plaintiff.

W. R. Badgett and Watson, Buxton & Watson for defendants.

CLARK, C. J. The only question involved is whether under the amendment to the charter of the town, chapter 337, Pr. Laws 1913, enacted 4 October, 1913, the ordinance passed in pursuance thereof,

the board of commissioners were authorized, after having given due notice to the plaintiff, to pave his sidewalk on his refusal to do so, and to collect the assessment for the cost. The plaintiff alleges that the amendment to the charter is defective in that it did not require the commissioners to give him notice. They did, however, give him the very fullest and amplest notice.

There is no question of the power of the Legislature to confer such authority upon towns and cities. *Raleigh v. Peace,* 110 N. C., 32, and other cases. It is indeed necessary for the proper development of the town that there should be paved sidewalks and that the town authorities, not each lot owner for himself, shall be judges of the localities whose traffic requires such improvements. There is no evidence here that this power has been arbitrarily or oppressively used. The property in question is on Main Street of the town and in front of the only hotel. There is no evidence that the price at which the work was done was excessive, and it was duly let to the lowest bidder. The town undertook to have the work done some three months after the plaintiff, though havin due notice of the order, had neglected or refused to take any steps to pave the sidewalk himself.

In *Kinston v. Loftin,* 149 N. C., 256, *Hoke, J.,* says, quoting from *Davidson v. New Orleans,* 96 U. S., 104: "Whenever by the laws
(121) of a State a tax assessment is imposed upon property and those laws provide for notice to the person, the judgment in such proceedings cannot be said to deprive the owner of her property without due process of law."

In this case the assessment against the plaintiff's property was made on 9 November, 1914, after written notice to the plaintiff that it would be done. He did not appear at the meeting of the commissioners nor otherwise make any objection to said assessment. In McQuillin Mun. Ordinances, sec. 318, it is said that under powers in the charter, ordinances have been sustained compelling abutting property owners on streets to construct and maintain sidewalks when necessary to the safety and convenience of pedestrians. This has been adjudged a proper exercise of the police power. The plaintiff saw the work being done in front of his hotel and warehouse lot, and not only made no effort to be heard nor took any legal steps to prevent the same, but by his conduct acquiesced therein. The assessments therefor were made and put in the hands of the collector, and he still took no action until his property was advertised for sale on 5 April, 1915.

The plaintiff has had every opportunity to be heard both before the work was begun and during its progress. He stood by and saw his property benefited at the expense of the town, and he cannot now be heard to contest repayment to the town treasurer of the sum which has

been paid by the other taxpayers for the benefit of his property and in discharge of the civic duty which was imposed on his property to furnish proper sidewalks.

In 2 Dillon Mun. Corporations (4 Ed.), sec. 752, it is said: "The expense of making local improvements is very generally met, in whole or in part, by local assessments authorized to be made upon property deemed to be benefited. Legislation of this character, both in respect to its justice and its constitutional validity, has been extensively discussed by the judicial tribunals of near every State in the Union. The courts are very generally agreed that the authority to require property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it." After citing many cases it is added: "In view of the fact that the expense of putting down a sidewalk after the grading is done may be apportioned among the abutting lot owners in proportion to their frontage, we can see nothing in the statutes which is repugnant to the Constitution, and we hold the act constitutional and valid."

The whole subject was fully discussed and the power settled in *Raleigh v. Peace,* 110 N. C., 32, where it was held that special assessments for local municipal improvements are not within the requirements of uniformity in taxation, the Court saying: "Such assessments are founded upon the principle that the land abutting upon the improvements receives a benefit over and above the property of the citizens (122) generally, and it should be charged with the value of such peculiar benefits." And further, "The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for, or the manner of making, such assessments, unless there is a want of power or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle." That case has been repeatedly cited with approval since. See Anno. Ed.

Arguments based upon decisions as to condemnation proceedings and the enforcement of penalties and forfeitures have no application to this proceeding, which is a local assessment for the public benefit laid upon the adjacent property owners.

The plaintiff has had the fullest opportunity of being heard. When served with notice of the order to lay the sidewalk he did not appear before the commissioners nor make any objections. When served on 7 January, 1914, with notice that unless he laid the sidewalks in front of his property the city would do so, and charge him with the costs, again he did not appear before commissioners or take any other steps to object. After three months delay, the city ordered the work to be

done. He stood by complacently and saw the sidewalks laid in front of his hotel and warehouse as they were in front of the property of his neighbors, and made no objection. He was notified of the amount of such assessments and has not objected that the cost was excessive or shown that such action was arbitrary. His property was in the center of the town and the pavement was laid in front of his hotel, which was the only one in town, and in front of his adjacent warehouse. His sidewalks must be paid for either at his expense or at the expense of the other taxpayers in the town. It is only after the lapse of eighteen months, after he was served with legal notice, and also had actual notice of the work going on, that he now objects for the first time and seeks to prevent repayment to the town treasurer of the sums spent on his sidewalks.

Indeed, it appears in the affidavits (which we can look into, this being an appeal in a proceeding for an injunction) that the plaintiff took a lively interest in the work of laying down his pavement. He pointed out where the curbing should be and made suggestions as to the grading, and at his hotel at his instance the pavement was made wider than was required by the ordinance, and at his request the width of the sidewalk in front of his warehouse was reduced from ten feet, specified in the ordinance, to five feet. Moreover, he promised to pay for the work after it was completed. Somewhat of this is denied in plaintiff's affi-
(123) davit, but in a matter of this kind an injunction should not be granted on such conflict.

If the plaintiff had any just cause of complaint on account of the excessive cost, or for discrimination against him in selecting his sidewalks for paving, or for want of notice, or for any other cause, he should have paid the assessment into the town treasury under protest and brought his action to recover the same. Revisal, 2855, which forbids the issuance of an injunction to restrain the collection of taxes or assessments. Besides, the plaintiff is estopped to object now, having had notice to put down the sidewalk, and notice later that if he did not do so the town would lay the sidewalk and charge the cost to him (to neither of which notices he responded), and further by his acquiescence in standing by while the work was being done and making no objection either before the town authorities or otherwise, taking part in laying out the work and even promising to pay.

The restraining order was improvidently granted and must be set aside.

Reversed.

HOKE, J., concurs in result.

WALKER, J., dissents.

Cited: Lewis v. Pilot Mountain, 170 N. C. 109 (1f); *Vester v. Nashville,* 190 N. C. 268 (2f).

FRANK KEY ET AL. v. BOARD OF EDUCATION OF GRANVILLE COUNTY.

(Filed 17 November, 1915.)

1. School Districts—Discretionary Powers—Mandamus.

The courts may compel the county board of education to act upon discretionary powers conferred on them by the Legislature, but cannot tell them how they must act.

2. Same—Elections—Abolishing District—Endorsement and Approval—Interpretation of Statutes.

Revisal, sec. 4115, as amended by chapter 524, Laws 1909, and chapter 135, Laws 1911, requires that where school districts have been established, the question of revoking the tax and abolishing the district shall be submitted to the electorate of the district upon a petition of two-thirds of the qualified voters therein, when endorsed and approved by the county board of education: *Held,* the requirement that the endorsement and approval of the board of education shall first be had confers on this board the exercise of a judicial or discretionary power necessarily implied from the use of the word "approved," and where it has acted upon the petition and in the unarbitrary exercise of this power has refused to order the election, the courts are without authority to compel them by *mandamus* to "endorse and approve" the election proposed.

3. Same—Prerequisites—Statutory Requirements.

It is a prerequisite to the valid ordering of an election by the county commissioners upon the question of revoking the tax and abolishing a school district, that the statutory requirements be first met, *i.e.,* that the petition be signed and endorsed and approved by the county board of education as specified by the statutes; and such election otherwise ordered by the county commissioners will be ineffectual.

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

APPEAL by defendants from *Cooke, J.,* 9 February, 1915, from (124) GRANVILLE.

Civil action to obtain a mandamus on defendant board, compelling them to "endorse and approve" a petition to the board of commissioners of Granville County, that they order an election on the question of the annulment of a special school tax district in said county and known as "Stoval Special Tax District, No. 2," heard on demurrer.

The complaint alleged that the said district was duly established in 1908 and had continued to operate under the law, section 4115, Revisal,

until the present year, when a petition, signed by two-thirds of the qualified voters of said district, requesting the county commissioners to order an election on the question of revoking said school district, was presented to the defendants, the board of education of Granville County, with the request that said board "endorse and approve" said petition.

The complaint then contains further averment as follows: "That the board of education considered the said matter and, after some hesitation and delay, declined and refused to endorse and approve said petition and does still decline and refuse to endorse and approve the same, contrary to the express requirement of the the statute above mentioned," and further:

"6. Your petitioners are informed and believe that the county commissioners are without authority to order the election demanded unless the petition therefor is endorsed and approved by the county board of education, the defendant, and that in the absence of such endorsement and approval by the said county board of education, your petitioners are without remedy against the tax levy referred to; whereas, if said petition should be endorsed and approved by said defendant your petitioners might be speedily relieved of the same.

"7. And your petitioners are advised that the defendant has no right or authority to withold its endorsement and approval of said petition, but is bound, upon the showing made, to endorse and approve the same. The defendant did not refuse its endorsement and approval of said petition on account of any defect in the petition or any lack of numbers of signers."

Defendant board demurred to the complaint in terms as follows:

"For that the declarations stated in complaint of the plaintiffs in this action, and the matters therein set out, in manner and form ap-
(125) pearing as above, are not sufficient for the said plaintiffs to have and maintain their aforesaid action against said defendant board, and that the said defendant board of education declined to endorse the petition as set out in said complaint in the exercise of a sound and reasonable discretion, and demur to the said complaint and ask that it be dismissed.

"Wherefore, for want of a sufficient declaration in this behalf, the said defendant board prays judgment that the said plaintiffs may be barred from having or maintaining the aforesaid action against said defendant board, and that the plaintiffs herein named to be required to pay the costs of this proceeding."

There was judgment overruling the demurrer and commanding defendant board to endorse and approve the petition as prayed for in the complaint, whereupon defendants, having duly excepted, appealed.

T. T. Hicks for plaintiffs.

B. S. Royster and B. K. Lassiter for defendant.

HOKE, J., after stating the case: The statute authorizing the formation of these special school districts, Revisal, sec. 4115, has been so amended by chapter 524, Laws 1909, chapter 135, Laws 1911, that on petition of two-thirds of the qualified voters residing in any special taxing district, "endorsed and approved by the county board of education," the board of county commissioners shall order an election in said district for submitting the question of revoking said tax and abolishing said district, etc. It has been held that, as an essential requirement to a valid election, this preliminary petition must be properly preferred (*Gill v. Comrs.*, 160 N. C., 176), and the question presented is whether, on the facts as alleged in the complaint, the county board of education may be compelled by mandamus to "endorse and approve" the petition.

It is the recognized principle with us, upheld and approved in numerous decisions of this Court, that where discretionary powers are conferred on these ministerial boards, the court may not undertake to direct them as to how such powers shall be exercised in a given case. They may compel such a board to act in the premises, but cannot tell them how they must act. *Edgerton v. Kirby*, 156 N. C., 347-351; *Board of Education v. Comrs.*, 150 N. C., 116-123; *Ward v. Comrs.*, 146 N. C., 534; *Burton v. Furman*, 115 N. C., 166; *Broadnax v. Groom*, 64 N. C., 244; *Atty.-Gen. v. Justices*, 27 N. C., 315; Abbott on Mun. Corp., sec. 1108; High on Extr. Legal Remedies, 2 Ed., sec. 24. In the citation to High on Extr. Legal Remedies, quoted with approval in *Board of Education v. Comrs., supra*, the principle is correctly stated as follows: "But the most important principle to be observed in the exercise of jurisdiction by *mandamus*, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the dis- (126) tinction between duties of a peremptory or mandatory nature and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the *mandamus* is sought. . . . And whenever such officers or bodies are vested with discretionary powers as to the performance of any duty required at their hands, or when in reaching a given result of official action they are necessarily obliged to use some degree of judgment and discretion, while *mandamus* will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion of control or dictate the judgment or decision which shall be reached." And again, in section 34: "An important distinction to be observed in the outset, and which will more

fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act or may set him in motion, it will not further control or interfere with this action, nor will it direct him to act in any specific manner."

In the present case it is not alleged that the board of education has refused to act on the question presented, nor even that they have acted arbitrarily. On the contrary, the averment in the complaint relevant to the point is that the board of education "considered the matter and, after some hesitation and delay, refused to endorse and approve the petition," and, from a perusal of the subsequent and additional allegations of the complaint, it will appear that the suit proceeds upon the idea that the duties of the board of education are merely ministerial, being confined to ascertaining if the signers of the petition are resident within the district and whether they constitute two-thirds in number of the resident voters. But, in our opinion, such a position cannot be sustained. In a case like the present, the primary and controlling significance of the word "approve" imports the exercise of judgment. This is true as a matter of linguistic definition and, on reason as well as authority, we must hold that, in requiring as a preliminary essential that the petition shall be "endorsed and approved" by the board, and statute conferred and intended to confer upon that body the power to give or withhold their approval as their judgment may dictate, having regard to the best interest of the community affected (*Lane v. Ins. Co.*, 142 N. C., 55; *S v. Smith*, 23 Montana, 44; *Costner v. Calusa County*, 58 Cal., 274-275), the purpose evidently being that, when one of these taxing districts had been formally established, it should not be
(127) revoked unless the two interests more directly involved and best acquainted with conditions should concur in the movement to have the same annulled.

The authorities cited in the learned brief of counsel for appellee were cases where the powers conferred were held to be purley ministerial and the right to *mandamus* was very clearly established.

There was error in overruling the demurrer and, on the record, there should be judgment that defendant go without day.

Reversed.

ALLEN, J., dissenting: I concur in the general principles stated in the opinion of the Court, but I think they have no application to the statute before us.

The General Assembly at first provided for elections to be held in school districts, upon petition, to ascertain if the voters would consent to the levy of a special tax for school purposes. The object of the statute was to stimulate interest in education and to afford an opportunity to those who desired better school facilities to obtain them; but it was soon found that many were unwilling to vote for the tax if they could not get rid of it, if they became dissatisfied or reached the conclusion that it was no longer necessary, and the original act was amended in 1909 and 1911 by adding thereto the following:

"Upon petition of two-thirds of the qualified voters residing in any special tax district established under this section, endorsed and approved by the county board of education, the board of county commissioners shall order another election in said district for submitting the question of revoking said tax and abolishing said district, to be held under the provisions prescribed in this section for holding other elections: *Provided,* that no election for revoking a special tax in any special tax district shall be ordered and held in said district within less than two years from the date of the election at which the tax was voted and the district established, nor at any time within less than two years after the date of the last election on said question in said district; and no petition revoking such tax shall be approved by the county board of education oftener than once in two years."

The dominant and controlling purpose of the act as amended is that the people of a school district may by popular vote determine for themselves the wisdom and expediency of levying, in the first instance, and of discontinuing the tax, and I cannot think it was the intention of the General Assembly to invest in the board of education, a nonelective body, with authority, as a supervising guardian, to thwart this purpose.

The people have the right to a vote—the statute says so—but, under the construction placed on the statute by the Court, the board of education may, without giving any reason for its action, say to (128) them, "You shall not vote," although the requirements of the statute have been complied with.

Why give the right to hold an election if this is what was meant by the Legislature? It would have been simpler and less misleading to have provided that the tax should be discontinued when so ordered by the board of education.

What, then, is the meaning of the language "endorsed and approved by the county board of education"? The county board has charge of the schools of the county, and knows the boundaries and patrons of the districts better than any other official body. It also knows when and where elections have been held. It was necessary that some one should examine and scrutinize the petition to see if in fact two-thirds of the

voters of the district had signed it, and also to ascertain if a school election had been held within two years.

These duties are imposed by the statute on the board of education, and when they have been performed, they can, in my opinion, be compelled to endorse and approve, and thereby make effective the real purpose of the statute, and not defeat it.

Did the General Assembly intend to say to the people, "Vote for a special tax for schools, and after you have tried it two years if you are dissatisfied or think the tax no longer necessary you may hold another election on the question if you satisfy the board of education that two-thirds of the voters desire it," or, "Vote for the tax, and after you have tried it two years you may hold another election if the board of education will permit the election to be held"?

I think the first construction the better.

BROWN, J., concurs in dissenting opinion.

Cited: Comrs. v. Malone, 179 N. C. 112 (3d); *S. v. Vanhook,* 182 N. C. 834 (1p); *Perry v. Comrs.,* 183 N. C. 393 (3p); *Wilson v. Comrs.* 183 N. C. 640 (3b); *Person v. Watts,* 184 N. C. 506 (1p); *Lazenby v. Comrs.,* 186 N. C. 549 (3d); *Bd. of Education v. Comrs.,* 189 N. C. 652 (1g, 2b); *Bizzell v. Goldsboro,* 192 N. C. 360 (1j); *Young v. Comrs. of Rowan,* 194 N. C. 774 (3g); *Harris v. Bd. of Education,* 216 N. C. 151 (1f).

J. T. RENN v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 17 November, 1915.)

1. Master and Servant—Federal Employers' Liability Act—Exclusive Provisions—State Court.

The Federal Employers' Liability Act supersedes and is exclusive of the State statutes upon the same subject-matter.

2. Master and Servant—Federal Employers' Liability Act—Pleadings—Amendments—State Courts.

An amendment to the complaint in an action brought in the State court under the provisions of the Federal Employers' Liability Act so as to allege a cause of action thereunder, presents a matter of pleading and practice which the Federal courts will not review.

(129) **3. Pleadings—Proof—Variance—Interpretation of Statutes.**

A variance between the pleadings and proof will not be regarded as material unless it misleads the complaining party to his prejudice in

maintaining his action upon its merits (Revisal, sec. 495); and where the complaint is objected to on the ground that it does not state a cause of action the objection will not be sustained if, as appearing therefrom, the facts alleged are sufficient for that purpose, when liberally construed, however inartificially the complaint may have been drawn.

4. Same—Master and Servant—Federal Employers' Liability Act.

Where the plaintiff, an employee, is injured by a railroad company while engaged in interstate commerce, and therefore has no cause of action except under the Federal Employers' Liability Act, and in his complaint alleges that the defendant negligently caused the injury by failing to provide him a safe place to do the work required of him, for which he asks damages; that the defendant was operating an interstate railroad, without reference to intrastate business; that he was an employee of the defendant and injured in the discharge of his duties as such: *Held*, allegations sufficient to bring the cause of action alleged within the Federal statute and for the plaintiff to maintain his action thereunder.

5. Pleadings—Amendments—Master and Servant—Federal Employers' Liability Act—Statutes.

Our statute permits pleadings to be amended as of course, without cost or prejudice to the proceedings already had at any time before the period for answer expires, or thereafter, unless it is for the purpose of delay beyond the term for trial (Revisal, sec. 505), or within the discretion of the trial judge, on such terms as he may deem proper, among other things "by inserting other allegations material to the cause (Revisal, sec. 507); and where the cause of action falls within the Federal Employers' Liability Act and is brought in the State court, an amendment may be allowed there alleging it to have been brought under the provisions of that act, where, as in this case, the original complaint, with the amendment, states a good cause of action thereunder.

6. Master and Servant—Pleadings—Amendments—Federal Employers' Liability Act—State Courts—Concurrent Jurisdiction—Statutes.

Where an action has been brought in the Federal court under the provisions of the Federal Employers' Liability Act, allegations material to the case may be inserted by amendment in conformity with our statute (Revisal, sec. 507), and as our State courts are given concurrent jurisdiction with the Federal courts by the Federal statutes, the State court is given like power to permit amendments when the action has been commenced therein.

7. Master and Servant—Federal Employers' Liability Act—Pleadings—Amendments—Limitation of Actions.

Where an action has been brought in the State court under the provisions of the Federal Employers' Liability Act, and an amendment to the complaint has been properly allowed to bring the cause within the terms of the Federal statute, the amendment relates back to the time of the commencement of the action, and the statutory provision that the action must be brought in two years has no application when the action itself has been commenced in the required period.

8. Master and Servant—Negligence—Duty of Master—Safe Place to Work—Trials—Evidence—Questions for Jury.

In an action to recover damages for a personal injury to an employee caused by the negligence of the defendant railroad company, where there is evidence tending to show that the plaintiff, whose duty it was to (130) repair pumps along the defendant's line of interstate railway, was injured, while in the course of his employment, at night, by falling upon ice formed upon the usual path from the pumping house, caused by the negligent overflow of the defendant's water tank, in freezing weather, which should have been removed by the defendant's employees, engaged in this character of work at the place during the preceding day; that at the time the plaintiff was carefully walking along this path behind the one who had been operating the pump and who carried a lighted lantern to show them their way; that the ice had become covered with snow which concealed it; that plaintiff was not informed thereof by the other employee of the defendant; that it was unusual for the defendant to permit this condition at the place: *Held*, sufficient upon the issue of defendant's actionable negligence in failing to provide a safe place for the plaintiff to go while in the performance of the work required of him.

9. Master and Servant—Negligence—Assumption of Risks—Instructions—Trials.

Where an employee of a railroad company sues for damages for a personal injury received by falling upon ice negligently left at a place where he was required to go at night in the course of his employment, and there was evidence tending to show negligence therein on the part of the defendant and proper care by the plaintiff while walking there; that the snow covered and concealed the ice, of which the plaintiff was neither aware nor informed, the occurrence being at night and by lantern light: *Held*, a charge of the court was correct that the plaintiff assumed the risks which inclement weather added to his employment, and if the injury complained of resulted solely from that source he could not recover; but if the ice there was caused by the negligence of the defendant in overflowing the water tank in freezing weather and the plaintiff was unaware of the fact, and could not have known thereof by the exercise of ordinary care under the circumstances, then he would not be held to have assumed the risks in walking upon the path at the time of the injury.

10. Evidence—Negligence—Opinion—Objectionable Answers—Motions to Strike Out—Objections Stated—Appeal and Error.

The negligence alleged in this action by an employee is that his employer, the defendant, had not provided him a safe place to work by reason of permitting ice to accumulate along a path he was required to go at night in the discharge of his duties, which the evidence tended to show was caused by the overflowing of a tank used by the defendant in the charge of another employer. The plaintiff's witness was asked, "Why was the tank running over?" to which he replied, "Because the pumper was neglecting his duty and let it continue to run after the tank was full." The admission of testimony that the pumper was neglecting his duty is disapproved as an expression of opinion, but the motion to strike

out the answer being made on another untenable ground stated at the time by the appellant, will not be considered on appeal.

11. Pleadings—Negligence—Allegations Sufficient.

Where an employee alleges negligence, in his action to recover damages against his employer, in his failing to furnish him a safe place to work, in that he negligently permitted ice, in freezing weather, to be upon a pathway he was required to go in the performance of his duties, and there is evidence tending to show that the defendant's water tank at this place was negligently pumped to overflowing and the freezing of this overflowing caused the ice complained of to form: *Held*, the evidence that the tank ran over was competent without being specially alleged, for the purpose of showing that the ice did not form from (131) natural causes.

12. Evidence—Answers of Witness—Opinion—Statement of Fact.

An answer to a question by a witness is not objectionable as a statement of an opinion upon the evidence, when, taking the answer as a whole and in connection with the context, it amounts only to testimony of a fact relevant to the inquiry.

13. Same—Contributory Negligence.

Where it is relevant to the inquiry in an action brought by an employee to recover damages caused by his falling upon ice alleged negligently to have been permitted to be upon a path the plaintiff was walking upon in the performance of his duties, testimony of the plaintiff that he did not cause his own fall, that he was as careful walking as he could be, is not objectionable as a statement of his opinion upon the fact, but is a statement of fact, and is admissible.

14. Evidence—Answer of Witness—Motion to Strike Out—Opinion—Testimony of Fact—Appeal and Error—Harmless Error.

Where a witness gives testimony beyond the scope of a question asked him, objection to such part of the answer should be by motion to the trial judge to strike it out; but under the circumstances of this case it is held that the part of the answer objected to was immaterial to the issue and would not have constituted reversible error if objection had been properly taken and overruled in the lower court.

BROWN, J., dissenting.

APPEAL by defendant from *Daniels, J.*, at June Term, 1915, of WAKE.

Action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant.

The original complaint is as follows:

1. That he is, and at the times hereinafter mentioned was, a resident of Wake County, North Carolina.

2. That the defendant is, and at the times hereinafter mentioned was, a corporation existing and doing business under the laws of the State

of North Carolina, and was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere.

3. That on 14 January, 1912, the plaintiff was in the employment of the defendant, and in the discharge of the duties of his said employment it became and was proper and necessary for the plaintiff to traverse a certain piece of ground beside the railroad track of the defendant and within its right of way at or near the station known as Cochran, Va., and to do so hurriedly in order to get aboard a train of cars then and there being operated by the defendant; that at the said time it was snowing and the ground had become and was covered and hidden by snow; that the defendant had carelessly and negligently caused, permitted and allowed water to be poured or spilled upon the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently permitted and allowed the said ice to be and remain upon the ground at the said place, and to become and be covered and hidden by
(132) the snow, and had thereby negligently caused a highly dangerous condition to exist, and the said place and condition was highly dangerous and perilous and the defendant had negligently failed to warn the plaintiff in any manner of the existence of said danger; and on account of the negligence of the defendant in the particulars aforesaid, the plaintiff, while proceeding along the said ground in the exercise of ordinary prudence and care, and without notice, knowledge or information or warning of any kind of the existence of said danger, was caused to slip and fall heavily upon the ground, and thereby his collar bone and other bones were injured and dislocated, and he was bruised and wrenched and strained and sprained, and he was caused to suffer other serious, painful, dangerous and permanent injuries to the muscles, bones, nerves and ligaments of his body, head and extremities, and caused to suffer much pain and anguish of body and mind.

4. That on account of the negligence of the defendant as aforesaid, the plaintiff has been damaged in the sum of ten thousand dollars ($10,000).

Wherefore, the plaintiff prays judgment that he recover of the defendant the sum of ten thousand dollars damages, and the costs of this action, and that he have such other relief as may be proper.

The plaintiff offered evidence tending to prove: That he was a resident of the city of Raleigh, N. C., and in the employment of the defendant as repairer of its pumps between Raleigh, N. C., and Richmond, Va., and in the course of his employment was ordered by the defendant to go, as he did, from Raleigh, N. C., to Cochran, Va., to repair one of the pumps used by the defendant in connection with its line of railroad from Raleigh to Richmond; that he arrived at Cochran after

dark; that the station building there is on the west side of the track; that across the track to the east there is a water tank which was used to supply water to engines of the defendant operating between Richmond and Raleigh; that the ground upon which the foundation of the tank is built is a couple of feet or more lower than the track; that southwardly from the tank is a tool-house which is about . . . feet from the tank, and about . . . feet northwardly from the tank and located in a depression is the pump-house; that water was pumped from the pool beside the pump up to the tank; that the railroad beside the pump-house was on a fill some . . . feet high; that there was a path or way leading directly down from the track to the pump-house, but this was quite steep; that there was another path leading from the pump-house southwardly, parallel with railroad track and up the incline and around behind the tank, then between it and the tool-house and up to the railroad track and across to the station; that this was the usual path used by pedestrians in going back and forth between the station (133) grounds and the pump, and the plaintiff was in this path when he fell; that upon his arrival that night the plaintiff left the train on the western side, went around the engine and down to the pump; that he then discovered that, to make the repair, he would need a four-inch flange union, and he recalled the campany had one at Skelton, Va.; that a work train of the defendant was standing on the track beside the station and about to leave (southbound) for Skelton, Va., and Norlina, N. C.; that the plaintiff, in company with the pumper, Lewis, and the section foreman, Parks, in charge of that section, left the pump-house for the purpose of boarding the train and going for said flange union; that the pumper led the way, carrying in his hand a lighted lantern, the plaintiff following a few feet after him, and the section foreman, Parks, following a few steps behind the plaintiff; that they traversed the above mentioned usual path and were still in the same and within a few feet of the railroad track when the plaintiff fell; that the path up to that point had been rough; that the weather had been cold for some time and there had been snow on the ground, which had partly melted during the days and froze again during the nights after being tracked, and hence was roughened; that during the day of the night on which plaintiff's injury occurred the defendant's pumper had unnecessarily allowed the pump to run long after the tank was filled with water and caused the tank to overflow for several hours, and this water which had overflowed for several hours, and this water which had overflowed had spread and frozen upon the ground and pathway at the place where the plaintiff fell, leaving a smooth, slick surface, dangerous for the use of pedestrians; that snow had been falling for an hour or two before plaintiff's fall, and this had covered the smooth ice, and plaintiff could

not see it, and knew nothing of the presence of the ice; that he did not know it was there and could not discover it by the use of his sight, and that he had never seen ice there before; that the defendant had never permitted the formation and accumulation of ice there before; that he was walking in a careful manner, watching his footsteps by the aid of the lantern in front of him; that neither the pumper nor the section foreman, Parks, had in any way warned him of the condition of said pathway, and that Parks knew it existed, as he had been present at the station all during the day and had seen the water overflowing for a long time and freezing, as aforesaid; that Parks had there present all during the day a section force of eight men and only three of them had been occupied during the day, and the work train had been at that station for several hours with its crew of hands, and none of them had removed the ice or roughened it, or placed any substance upon it to make the footing safe, and the ice covered at that point the usual
(134) path for approaching the train from that side of the station; that the plaintiff slipped on the ice and fell and was seriously injured.

The plaintiff introduced a witness by the name of Parks who was present at the time the plaintiff was injured and testified as to the condition of the ground, of the weather and to other circumstances, including that of the tank running over. He was asked the question, "Why was the tank running over?" and he replied, "Because the pumper was neglecting his duty and let it continue to run after the tank was full," and the defendant excepted.

At the conclusion of the evidence the defendant moved for judgment of nonsuit upon the following grounds:

1. That the evidence disclosed a right of action under the Federal Employers' Liability Act and that the complaint did not state a cause of action under this statute.

2. That there was no evidence of negligence.

The plaintiff contended that the complaint was sufficient and stated a cause of action under the Federal act, but asked leave to amend by alleging that the plaintiff was employed in interstate commerce at the time of his injury. The defendant objected to the amendment, as it appeared that it was asked for more than two years after the injury occurred. The amendment was allowed and the defendant excepted.

His Honor then overruled the motion for judgment of nonsuit and the defendant excepted. The defendant then filed an answer pleading the statute of limitations and assumption of risk as defenses.

The defendant requested his Honor, in apt time and in writing, to charge the jury, if they believed the evidence, to answer the issue as to

the assumption of risk in the affirmative. This was refused and the defendant excepted.

His Honor also instructed the jury to answer the issue as to the the employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work to be done by the employee. (The extent of its duty to its employee is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workmen.) To the foregoing charge in parenthesis defendant excepted.

His Honor also instruced the jury to answer the issue as to the statute of limitations in the negative, and the defendant excepted.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant? Answer: Yes.

2. Did the plaintiff assume the risk of injury? Answer: No.

3. Did the plaintiff, by his own negligence, contribute to his injury? Answer: No.

4. What damage, if any, is plaintiff entitled to recover? (135) Answer: $3,500.

5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce? Answer: Yes.

6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed? Answer: No.

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

R. N. Simms, J. C. L. Harris and Douglass & Douglass for plaintiff.

Murray Allen for defendant.

ALLEN, J. It is admitted that the defendant is a common carrier engaged in interstate commerce and that the plaintiff was employed in such commerce at the time of his injury. It was therefore necessary and essential to allege a cause of action under the Employers' Liability Act, because the Federal statute is exclusive and supersedes the right of action under the State law. *Mondou v. R. R.*, 223 U. S., 1; *R. R. v. Wulf*, 226 U. S., 570; and *R. R. Co. v. Hayes*, 234 U. S., 86.

In the last case the Court says, "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative"; citing for this position, among others, the *Mondou case,* which

says of the Employers' Liability Act: "And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded."

We must then examine the original complaint for the purpose of seeing if it alleges a cause of action under the Federal act, and, if not, must inquire into the power of the court to allow the amendment.

This presents a question of pleading and practice under the laws of this State, as the Supreme Court of the United States has said in *Brinkmeier v. R. R.*, 224 U. S., 268, in reference to an assignment of error on account of an amendment to a pleading: "Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the State it is not subject to review by us," and there are many other cases to the same effect.

When we turn to our statutes we find it is provided by section 515 of the Revisal that "No variance between a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits," (136) and by section 495, that "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

These statutes were considered in *Blackmore v. Winders,* 144 N. C., 215, and it was there held, with reference to a pleading, that "If it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader," and this was approved in *Brewer v. Wynne,* 154 N. C., 467.

If this rule of construction is applied to the original complaint and it is construed in the liberal spirit contemplated by the Code, it alleges a cause of action under the Federal statute.

It must be kept in mind that the plaintiff was employed in interstate commerce at the time of his injury by an interestate carrier, and that he had no cause of action except under the Federal statute, because, as we have seen, it had the effect of superseding the State laws.

The original complaint alleges that the plaintiff was injured by the negligence of the defendant and that this caused him damage, which

he prays the court to award him. He could not be entitled to recover damages except under the Federal statute. He alleges further that the defendant was operating a line of railway in the States of North Carolina and Virginia, and this made it an interstate carrier. There is no reference in the complaint to the fact that the defendant did an intrastate business. The plaintiff alleges further that he was in the employment of the defendant, presumably in the interstate business which the defendant was conducting. He says further that he was in the discharge of the duties of his said employment at the time of his injury and that he lived in Wake County, N. C., and was injured in Cochran, Va.

As there is no reference to intrastate business in the complaint, and it is alleged that the defendant was doing an interstate business, that he was injured while in the discharge of his employment, is not the inference permissible and reasonable that he was employed in interstate business and was injured in the discharge of his duties in that employment? If, however, the original complaint does not allege a cause of action under the Federal act, we are of opinion that the court had the power to permit it to be amended by alleging that the defend- (137) ant was employed in interstate commerce at the time of his injury.

We must again have recourse to our own statutes and decisions, and we find that "Any pleading may be once amended of course, without cost and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of the term for which the cause may be or is docketed for trial" (Rev., sec. 505), and that "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or *by inserting other allegations material to the case.*" Rev., sec. 507. (Italics ours.)

These sections of the Revisal have been very fully considered in *Ladd v. Ladd,* 121 N. C., 118; *Lassiter v. R. R.,* 136 N. C., 93; *Bank v. Duffy,* 156 N. C., 87, and in other cases, and the distinction is drawn between a *defective statement of a cause of action which may be amended* and the statement of a defective cause of action which cannot be amended.

In the *Lassiter case* the Court says: "The difference between a defective statement of a good cause of action which can be amended by inserting other material allegations and a statement of a defective

cause of action is that the latter cannot be made a good cause by adding other allegations."

If this is a correct statement of the law, it is conclusive upon the power of the court to amend the complaint by allowing an additional allegation to be made, as the original complaint with the amendment admittedly states a good cause of action under the Federal statute. *R. R. v. Wulf,* 226 U. S., 570, seems to be decisive of the right to amend. In that case Sallie C. Wulf commenced an action in the Circuit Court of the United States in the Eastern District of Texas, in her individual capacity to recover damages for the death of her son who was killed in Kansas, and she alleged in her original complaint that in the State of Kansas a right of action was provided by statute for injuries resulting in death. The defendant was engaged in interstate commerce and the intestate was killed while employed in that commerce. The plaintiff could not sue in her individual capacity under the Federal act. More than two years after the injury the Circuit Court permitted an amendment by which she was allowed to prosecute the action as administratrix of her son. The Supreme Court of the United States approved the amendment and held that it was not equivalent to the com-
(138) mencement of a new action so as to render it subject to the two years limitation prescribed by section 6 of the Employers' Liability Act, and that the amendment related back to the beginning of the action.

R. R. v. Wyler, 158 U. S., which is relied on by defendant, is commented upon in the *Wulf case* and distinguished, and it was pointed out that in the *Wyler case* the amendment introduced a new and distinct cause of action, while in the case before us there is but one cause of action, and if the original complaint was defective it is only because of the absence of one allegation necessary to a complete and perfect statement of a cause of action.

The Employers' Liability Act confers concurrent jurisdiction upon the State courts for the trial of causes of action arising thereunder and, instead of prescribing the practice and procedure for the State courts, it is provided in another act of Congress as to actions at law in the Federal courts (and this falls within that class), that "The propriety of amendments to pleadings in the Circuit and District Courts of the United States is governed by the provisions of section 1914 of the Revised Statutes to the effect that: The practice, pleadings and form and mode of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and form and mode of proceeding existing at the time in like causes in the courts of record of the State within

which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding. 1 Ency. U. S., 298."

If, therefore, the action had been commenced in a court of the United States the power would have existed of "inserting other allegations material to the case" in conformity with our statute (Rev., sec. 507), and this power cannot be less when the action is brought in the courts of the State.

If a proposed amendment cannot be allowed because material and necessary to the statement of a cause of action, the power of amendment, which *Mr. Justice Swayne* says, in *Tilton v. Cofield,* 93 U. S., ... "is incidental to the exercise of all judicial power and is indispensable to the ends of justice," becomes useless and of no effect, as an amendment need not be made if not material.

We therefore conclude that the court had the power to allow the amendment, and this also disposes of the exception to the charge upon the sixth issue because the amendment related back to the commencement of the action, which was brought within two years from the time of the injury.

The defendant also relies, in his motion for nonsuit, upon the contention that there is no evidence of negligence, and this necessitates an examination of the duty imposed upon the employer and whether the evidence discloses a failure to perform that duty, which proxi- (139) mately caused the injury to the plaintiff.

In *R. R. v. Horton,* 233 U. S., 492, the Court says: "The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence is exercised, to the end that the place in which the work is to be performed and the tools and appliances for the work may be safe for the workmen," and concludes that the Employers' Liability Act has not changed this rule of liability.

It being, then, the duty of the defendant to furnish the plaintiff a reasonably safe place in which to do his work, and the authorities are all to this effect, is there any evidence that it failed in the performance of this duty?

The plaintiff was injured at night and he testifies that he was exercising due care for his own safety. He had not been about the premises where he was injured on the day of the injury until he was injured.

There is evidence that an employee of the defendant whose duty it was to pump water into the tank unnecessarily permitted the pump to continue working after the tank was full, and that this caused water to pour out upon the path over which the plaintiff was required to go in the performance of his duties; that this continued for such a length

of time that a solid sheet of ice formed across the path; that the ice was smooth, slippery and dangerous, that the weather was very cold and that it might be reasonably anticipated that ice would form where the water fell; that this continued during the day before the plaintiff was injured and that the ice could have been easily removed; that a sufficient work force was present and available to remove the ice, and that it did not do so; that this work force had removed ice from the pathway nearer to the station than the place where the plaintiff was injured; that the ice was covered with snow which concealed its presence from the plaintiff. This furnished some evidence that the defendant had failed in the performance of its duty to provide a reasonably safe place for the plaintiff to work, and the evidence further shows that the plaintiff was injured by the failure to perform this duty. We therefore conclude that the judgment of nonsuit was properly overruled.

The charge of his Honor as to the duty of the defendant to provide a safe place is substantially taken from the *Horton case,* which we have before cited, and the same case sustains the ruling refusing to direct a verdict in favor of the defendant on the issue of assumption of risk. In that case the Court says: "Such dangers as are normally and necessarily incident to the occupation are presumably taken into the
(140) account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

His Honor followed this statement of the law, quoting this language from the opinion, and saying further: "If, by the exercise of ordinary care and prudence (it was the duty that he owed), he could have seen that the ice had accumulated at that place, and could have become aware that there was risk in walking over it, then he would be charged with such facts as the exercise of such ordinary care would have disclosed to him, and if you are satisfied that they would have disclosed to him that the ice was there and that it was slippery, then you will find that he has assumed the risk of the injury in passing over it, and in that event you would answer the second issue 'Yes'." And again, "That the plaintiff in his employment, fixing pumps for the defendant, and in going from place to place in the performance of his duty, assumed the risk which inclement weather added to his employment, and

if you find by the greater weight of the evidence that the plaintiff slipped on the ice or snow, which resulted solely from the inclement weather conditions, and that the same were not negligently left on the path over which he was traveling, if he was traveling over the path, you will answer the issue of assumption of risk, the second issue, 'Yes.'" And again, "If you find from the evidence, by the preponderance thereof, that the plaintiff knew of the existence of the ice at the place where he fell, or by the exercise of care, the care of a prudent man, could have knowledge of its existence at that point, he assumed the risk of injury from slipping thereon, and you will answer the issue of assumption of risk, which is issue No. 2, 'Yes.'"

This complies with the rule laid down in the *Horton case,* because if the evidence of the plaintiff is true, the condition of the place where the plaintiff was injured was not normal, but was unusual, and the plaintiff could not discover it by the exercise of ordinary care.

The witness Parks was asked: "Why was the tank running over?" Objection by the defendant. Objection overruled; defendant excepted. He replied: "Because the pumper was neglecting his duty and let it continue to run after the tank was full." We do not approve of the expression, "because the pumper was neglecting his duty," and doubtless if defendant had moved to strike this out as an expres- (141) sion of opinion the motion would have been granted, but the motion to strike out was made upon another ground and one which is not tenable—that this particular act of negligence was not alleged in the complaint, and it is well settled that "Where a party states the ground of his objection to evidence below he cannot rely upon a different ground in this Court." *Ludwick v. Penny,* 158 N. C., 113.

In *Presnell v. Garrison,* 122 N. C., 595, *Furches, J.,* says: "But as a wrong reason was assigned for the objection, we treat the case as if no objection had been taken"; and *Rollins v. Henry,* 78 N. C., 342; *Kidder v. McIlhenny,* 81 N. C., 123, and *Jones v. Call,* 93 N. C., 179, support the same rule.

It was not necessary to allege the negligent act of permitting the tank to run over, in the complaint, because the negligence relied on is that the defendant did not provide a safe place for the plaintiff to work, and evidence that the tank ran over was competent under this allegation for the purpose of showing that the ice did not form across the path from natural causes.

If, however, his Honor had been asked to strike out the answer of the witness upon the ground that it was an expression of opinion, his refusal to do so would not have constituted reversible error, because when the answer is considered as a whole and in connection with the context it amounts to no more than a statement that the pumper per-

mitted the pump to continue to run, and the tank ran over, which is a fact and not an opinion.

The plaintiff while on the witness stand was asked: "Did you cause your own fall in any way?" Objection by the defendant; objection overruled; defendant excepted; and he replied: "No, I did not. I was just as careful walking as I could be." *Phifer v. R. R.*, 122 N. C., 940, is authority for the position that the latter part of the answer is objectionable as an expression of an opinion, but the later cases and the trend of authority elsewhere are that it is competent as a statement of a fact. *Taylor v. Security Co.*, 145 N. C., 385; *Britt v. R. R.*, 148 N. C., 40; *S. v. Leak*, 156 N. C., 647; 3 Wig. Ev., sec. 1938; McKelvey Ev., p. 220.

Professor Wigmore says, vol. 3, sec. 1949: "This topic is one of the few upon which there has ever existed in the English precedents any foundation for doubt. The subject of the testimony in question is manifold; sometimes it is whether proper care was taken, sometimes whether action was reasonable, sometimes whether sufficient skill was shown, sometimes whether a place or a machine was safe; but all the forms seem reducible to a general one, namely, whether a certain standard of conduct was observed. Looking first at the orthodox prac-
(142) tice in England, it is clear there is not and never has been any real question as to the propriety of such testimony. The morbid and doctrinaire theory of cautiousness which is the foundation of the American rulings has never been known at the English bar." He speaks of the rule of exclusion as a "modern excrescence on the common law" and concludes that such evidence is competent.

Mr. McKelvey, in a passage quoted with approval in *S. v. Leak*, says: "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence. A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature. This class of evidence

is treated in many of the cases as opinion admitted under exception to the general rule, and in others as matter of fact—'shorthand statement of fact'—as it is called. It seems more accurate to treat it as a fact, as it embraces those impressions which are practically instantaneous, and require no conscious act of judgment in their formation. The evidence is almost universally admitted, and very properly, as it is helpful to the jury in aiding to a clearer comprehension of the facts."

In *S v. Williams,* 168 N. C., 195, expressions in dying declarations "I did nothing," "He cut me for nothing," "They had no occasion to shoot me," "I have done nothing to be shot for," are considered as statements of facts and not opinions. If, however, the evidence was objectionable it could have had but little, if any, bearing upon the issue, because the plaintiff described his conduct in detail and showed he was careful, and there was no evidence to the contrary.

We might also dispose of the exception upon the ground that it was competent for the witness to say he did not cause his own fall, and if the answer went beyond the question the remedy of the defendant was to move to strike out. *Caton v. Toler,* 160 N. C., 106.

The judges of the Superior Court should be careful in the application of this principle to see that opinions are not admitted under the guise of facts, and usually it is better and wiser to require the wit- (143) ness to state the circumstances surrounding the transaction and no more.

We have carefully considered the whole record and find no error.

No error.

BROWN, J., dissenting: 1. The original complaint in this case does not state a cause of action under the Federal Employers' Liability Act. The argument that it does state such a cause of action is the same argument advanced in the first employers' liability case, *Howard v. R. R.,* 207 U. S., 463, and was rejected by the United States Supreme Court. It was held that the Federal Employers' Liability Act of 1906 was unconstitutional because it embraced all of the employees of a carrier engaged in interstate commerce, whether the employees were employed in such commerce at the time of their injury or not. Congress then passed the act of 1908 and limited it to employees who are killed or who are injured *while employed in interstate commerce.* The most essential part of a cause of action under the statute is the character of the employment in which plaintiff was engaged at the time of his injury. It makes no difference that the employer is a carrier engaged in interstate commerce, unless the injured employee was employed in such commerce at the time of his injury. In *Brinkmeier v. R. R.,* 224 U. S., 268, the terms of the act in question were such that its application de-

pended, first, upon the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such carrier, but only such as were used in interstate commerce. *Mr. Justice Van Devanter*, writing the opinion of the Supreme Court of the United States, says:

"This was an action to recover for personal injuries sustained by a brakeman while coupling two freight cars on a sidetrack of the defendant railway company at Hutchinson, Kansas. The defendant prevailed in the State courts (81 Kan., 101, 105 Pac., 221), and the plaintiff brings the case here. The injury occurred 12 November, 1900, and the action was begun 15 March, 1901.

"The question first presented for decision is whether the petition stated a cause of action under the original safety appliance act of 2 March, 1893, 25 Statutes at Large, 531, chapter 196, United States Compiled Statutes, 1901, page 3174, which made it unlawful for any common carrier engaged in interstate commerce by railroad 'to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact,' etc. The petition, if literally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that
(144) the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The Supreme Court of the State held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right."

It would seem unnecessary to refer to other authorities in support of the propositions, first, that the construction of this complaint for the purpose of determining whether it states a cause of action under the Employers' Liability Act is a Federal question, and not subject to control by State statutes and the decisions of State courts; and, second, that the complaint does not state a cause of action under the Federal act. Reliance by the Court upon the language quoted from the *Brinkmeier case* to support the conclusion that this is not a Federal question results from a misunderstanding of the language used and its effect. Plaintiff brought suit in 1901, alleging a cause of action under the State law. In 1908 he proposed to amend so as to bring the action under the Federal safety appliance act. The Kansas court held that this amendment could not be made, the period of limitation having expired in the meantime. The Supreme Court of the United States said that this ruling involved only a question of pleading or practice under the laws of the State. If the Federal safety appliance act is examined,

the reason for this statement will become apparent. That act contains no limitation whatever as to time within which an action based upon its provisions must be brought. The period of limitation referred to by the Kansas court and by the Supreme Court was the limitation fixed by the law of Kansas, and neither the plaintiff nor defendant could have been deprived of a right arising under a Federal statute by the ruling of the Kansas court permitting the amendment. In the case before us the Federal act limits the time. There can be no doubt that the United States Supreme Court will review the ruling of a State court which deprives a defendant of the benefit of this provision of the act.

In Thornton's Federal Employers' Liability Act (2d edition), sec. 140, it is said: "The true rule is that if the declaration or complaint does not disclose the action is based or grounded upon the statute, then the plaintiff is not seeking to recover for an injury received while engaged in interstate traffic of the defendant, and the sufficiency of his pleading must be measured by the general State law, the provisions of the statute not being involved. However, if the evidence discloses the case is one under the statute, there will be a fatal variance and the plaintiff must fail."

The conclusions in the opinion that the complaint sufficiently alleges that the plaintiff was employed in interstate commerce are drawn from these facts: An employee of an interstate carrier who lives (145) in Wake County, North Carolina, is injured while at work in Cochran, Va. If this conclusion is justified the test for the application of the statute would be, not the character of the employment, but the place of residence of the employee. If the inference is permissible, as is suggested, that plaintiff was employed in interstate commerce when injured, he would have required proof of no other facts than those alleged in order to recover under the Federal act. Can it be possible that any court would hold that proof of the facts alleged, and no more, would show a case triable under the Federal act to the exclusion of the State law?

2. The court had no power to allow the amendment because it sets up a new cause of action, which is barred by the two-year period of limitation fixed by the Federal act.

This is a Federal question, involving the enforcement of one of the most important features of the Federal Employers' Liability Act, and in looking to our statutes and decisions as the means of depriving the defendant of the benefit of the limitation period provided by section 6 of that act, I think the Court is going astray. But if we look to our statutes and decisions, there is every authority for holding that the allowance of this amendment was erroneous.

It will be found that section 507 of the Revisal does not end with the language quoted in the opinion, but contains this further provision, which is the part particularly applicable to this case: "Or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the fact proved." The plaintiff was permitted to amend his complaint to coinform to the facts proved, and the statute by strongest implication prohibits this when, as here, the amendment changed substantially *the claim and the defense.*

It is true that we have held that a defective statement of a good cause of action may be amended, but such decisions cannot be applied in this case. This is not a defective statement of a good cause of action. It is a perfect statement of a cause of action good at common law and under the State statute. The fact that plaintiff did not have the cause of action which he pleads does not make his plea defective. The Court fails to note the distinction between the cause of action which arose in favor of plaintiff and the cause of action which he sets forth in his complaint. Defective statement of a good cause of action may be taken advantage of by demurrer. Would this Court seriously consider a demurrer to the original complaint in this action? It is lacking in none of the essentials of a cause of action, and a demurrer would have been overruled without argument. It is true, as the Court says, that the original complaint with the amendment states a good cause of action under the Federal statute, and that is the very basis of the de-
(146) fendant's objection, that it does so after the right of action under the statute has expired. But it does not follow that the original complaint contained a defective statement of the same cause of action rather than a good statement of a different cause of action.

It has been the long established rule in this State that where by an amendment a new charge is introduced against the defendant, he may make such defenses to it as if it were the foundation of an action then newly begun. *Christmas v. Mitchell,* 38 N. C., 535; *Cogdell v. Exum,* 69 N. C., 464; *Patterson v. Wadsworth,* 89 N. C., 407; *Gillam v. Insurance Co.,* 121 N. C., 369. "Amendments are not admissible where the effect would be to prejudice acquired interests, or take away any defense which could be made to an action begun at the time of the amendment." *Henderson v. Graham,* 84 N. C., 496.

"Where the cause of action is changed by an amended complaint, the defendant has the right to set up in the answer thereto any legal defense, including the statute of limitations, just as if the action had been commenced at the date of the amended complaint." *Sams v. Price,* 121 N. C., 392.

In *Bennett v. R. R.,* 159 N. C., 345, we said: "While courts are liberal in permitting amendments, such as are germane to a cause of

action, it has been frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. *Best v. Kinston,* 106 N. C., 205; *Merrill v. Merrill,* 92 N. C., 657; *Clendennin v. Turner,* 96 N. C., 416. In the last case it is said: 'The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will make substantially a new action, as this would be not to allow an amendment, but to substitute a new action for the one pending.'" *Hall v. R. R.,* 146 N. C., 345.

The Federal Employers' Liability Act gives a cause of action separate and distinct from the common-law cause of action and the cause of action created by our Revisal, sec. 2646. *R. R. v. Horton,* 233 U. S., 492. A cause of action not previously existing was created by the Federal act. In *Taylor v. Taylor,* 232 U. S., 363, the Supreme Court says: "The Federal Employers' Liability Act is more than a statutory declaration of the remedy to be pursued; it is the 'source of his (the employee's) right.'" In *R. R. v. Behrens,* 233 U. S., 473, *Mr. Justice Van Devanter* says: "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." See also, *Pedersen v. R. R.,* 229 U. S., 150; *R. R. Co. v. Craft,* 237 U. S., 648; *Mondou v. R. R.,* 223 U. S., 1; *R. R. v. Vreeland,* 227 U. S., 59.

If, as is held by the Supreme Court of the United States, the (147) effect of this statute was not to create a new remedy for an existing cause of action, but to create a new cause of action, then it follows necessarily that it is not the same cause of action as that existing at common law and under the statute of this State, and, in introducing this cause of action by way of amendment, the plaintiff cannot avoid the requirement that suit to enforce such cause of action must be brought within two years after the cause of action accrued. Our decisions, which I have cited, seem to conclusively support the defendant's position in this case. But, as I have said, this is not a State but a Federal question, and must be controlled by the decisions of the United States courts. *R. R. v. Wyler,* 158 U. S., 293, seems to me to be directly in point against the plaintiff's right to amend his complaint. In that case the original complaint set forth a cause of action under the general law of master and servant. The amendment declared under a State statute regulating such action. It was held that this amendment could not be permitted because it constituted a departure in pleading and set up a new cause of action. The principles laid down in this case have been accepted everywhere, and the United States Supreme Court has had frequent occasion to re-examine the case, and its correctness has never

been questioned. *R. R. v. Laird,* 164 U. S., 396; *United States v. Dalcour,* 203 U. S., 408, 423; *R. R. v. Wulf,* 226 U. S., 570; *R. R. v. Hesterly,* 228 U. S., 703.

An examination of the *Wulf case,* 226 U. S., 570, will show that it is not decisive of the right to amend in this case. From the institution of the *Wulf case,* it was contended, and appears in the original complaint, that the plaintiff's intestate was *employed in interstate commerce* at the time of his death. The allegation is that the deceased at the time of his death was "in the employ of the defendant as a locomotive fireman and in the performance of his duties as such upon a train bound from Parsons, in the State of Kansas, to Osage, in the State of Oklahoma." The amendment permitted merely changed the character in which plaintiff sued from her individual capacity to admistratrix. The Supreme Court of the United States held that this was a change in form and not in substance and did not change the cause of action as originally alleged. The Court said in the opinion that in the original and amended petitions "It was sufficiently averred that deceased came to his death through injuries suffered while he was employed by the defendant in interstate commerce. In *Bactillo v. Commission Co.,* 131 Fed., 680, cited in the *Wulf case,* the rule of the Federal courts in respect to amendments is stated as follows:

"An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands
(148) the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the State, a plaintiff is only required to state the facts which constitute his cause of action."

It is clear that the *Wulf case* and the *Wyler case* are not in conflict. In *R. R. v. Hesterly,* 278 U. S., 703, it is said:

"The plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the State law, the defendant had no choice, if it was to defend upon the facts. Whether the defendant could have defeated the first count also on the ground that the plaintiff was suing upon a statute of one jurisdiction, whereas the action could be maintained only on that of another, need not be decided, since the defendant asks reversal of only so much of the judgment as rests on the

second count. Hence it is unnecessary to consider whether the principle of *R. R. v. Wyler,* 158 U. S., 285, 39 L. Ed., 983, 15 Sup. Ct. Rep., 877, or that of *R. R. v. Wulf,* 226 U. S., 570, 577, 57 L. Ed., 355, 33 Sup. Ct. Rep., 135, should be applied."

In *Morrison v. R. R.,* 40 App. Cas., D. C., 391, which is in point, it is said: "The original complaint herein invoked the rule of the common law as a ground of action. The attempt of the plaintiff more than one year after the alleged bad faith of the defendant to invoke a different rule, namely, the rule prescribed by the act of 1906, must be held to amount to the commencement of a new action. The change was one of substance and not merely of form. *R. R. v. Wyler,* 158 U. S., 285. It is unnecessary, therefore, to determine the effect of an excuse seasonably pleaded, for failure to bring the suit within the statutory period." *Moliter v. R. R.,* 168 S. W., 250, is in point and supports the defendant's position. It was there admitted that plaintiff was employed in interstate commerce by a carrier engaged in such commerce. It appeared that plaintiff failed to plead facts bringing his action under the Federal act, and proposed to amend, after verdict, so as to include the necessary allegations. The Court refused the amendment, and says:

"Plaintiff's action, as stated in his pleading, being either under the common law or the statute of Missouri, and not under the Federal statute, he cannot recover under the latter statute without changing his cause of action from law to law; and that we decided in *McAdew v. R. R., supra,* he could not do. See, also, *R. R. v. Wyler,* 158 (149) U. S., 285, 15 Sup. St., 877, 39 L. Ed., 983; *R. R. v. Seale,* 229 U. S., 156, 33 Sup. Ct., 651, 57 L. Ed., 1129.

"Plaintiff's contention is that, if the evidence showed his right of action was under the Federal statute, he could recover, although no facts constituting such action were pleaded, and although he did not submit the case to the jury under that statute. That idea is no less than a claim that a pleading does not bind the pleader, and indeed is unnecessary, since a recovery may be had for the violation of any right which the evidence may disclose. . . . But it is said that, conceding the error herein pointed out, judgment should nevertheless be affirmed and the cause remanded, to the end that the petition be amended to conform to the proof. We think there is no authority for such course. The defense in plaintiff's case is not a mere variance; it is a total failure to prove the cause of action alleged. 'In short, the case pleaded was not proved, and the case proved was not pleaded.' *R. R. v. Seale,* 229 U. S., 161. This is made manifest by the suggestion that under plaintiff's petition, contributory negligence does not affect the measure of his damages and only goes to defeat the action, while under the Federal

statute it does not defeat the action, but does affect the measure of damages."

In *Allen v. R. R.,* 229 Pa., 97, it is held that a complaint stating a cause of action under the State law cannot be amended, after the limitation period has expired, so as to charge that defendant failed to comply with the Federal Safety Appliance Act.

The Court says: "It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law; from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action. *R. R. v. Wyler,* 158 U. S., 285, 39 L. Ed., 983, 15 Sup. Ct. Rep., 877; *R. R. v. Hurd,* 56 L. R. A., 193, 47 C. C. A., 615, 108 Fed., 116."

In *Hall v. R. R.,* 157 Fed., 464, it is said: "The question of 'relation back' of amendments is a fiction of the law, and shall never be allowed when to do so would, to the prejudice of a litigant, deprive him of a substantial legal right." It is unnecessary to recite the features in which a cause of action at common law and under our statute differs from a cause of action under the Federal statute. They are
(150) numerous and important, as shown by the cases of *R. R. v. Zachary,* 232 U. S., 248; *R. R. v. Horton,* 233 U. S., 492; *R. R. v. Tilghman,* 237 U. S., 499; *R. R. v. Craft,* 237 U. S , 648; *R. R. v. White,* 238, U. S., 507, when considered in connection with *Zachary v. R. R.,* 156 N. C., 496; *Horton v. R. R.,* 162 N. C., 424; *Tilghman v. R. R.,* 167 N. C., 163; *Bolick v. R. R.,* 138 N. C., 370; *Burnett v. R. R.,* 163 N. C., 186.

3. I think the Court also errs in holding that there is any evidence of negligence in the record. I fail to see wherein the defendant was wanting in the discharge of any duty it owed the plaintiff on the night when he was hurt. Thousands of persons before this plaintiff have slipped up on the ice and hurt themselves without blaming any one but their own bad lack.

I cannot see that the defendant was negligent in not anticipating that its tank would overflow and the water would submerge the path and that the night would be freezing and the plaintiff would slip on it and injure himself. If it was the duty of the defendant to keep snow and ice off the path leading from the tank to the pump, it was its duty to keep it off of every path at every point on its right of way. It makes no difference how the water got on the path, whether through nature or

from the accidental overflow of the tank, if the defendant owed the plaintiff no duty to keep this particular path free from ice, there was no breach of duty upon its part.

There is no evidence that the path being used by the plaintiff was marked out by the defendant as the path for its employees. Plaintiff's witnesses said it was the usual path. They also said that employees were free to go any way they desired in getting to the pump, and the evidence shows that there were two additional paths. There is nothing to show that the defendant had ever adopted the path or designated it as the proper one for its employees; there is nothing to show that the defendant marked it out or kept it up. It may have been, and probably was, if a path at all, one of the several ways of getting to the pump. The tank and pump were both in the open country with nothing to prevent pedestrians using any path they saw fit, or walking in any direction they desired. Plaintiff says he was walking in the usual path from the pump to the train.

The evidence of the plaintiff shows that there is another path that he might well have taken which comes up to the other side of the tank and on the opposite side from that on which the plaintiff fell. Parks, one of the plaintiff's witnesses, testifies that one can go to the pump-house any way he wants to go; that there are other paths leading to the pump-house. This witness also says that it was a very hard winter, the hardest winter he had ever seen around Cochran, and that everything was frozen up. This evidence shows that the plaintiff had other routes to take, and if he saw fit to take the one that was covered with ice, (151) he did it with his eyes open and ought not to be permitted to recover.

The defendant had no notice that plaintiff would use that path. If it was dangerous to use plaintiff had equal opportunity with defendant to know the danger. Plaintiff had his choice of the paths leading to the pump. He was free to go where he pleased. That he selected the path in which the ice had accumulated during the day ought not to be charged against the defendant.

"The duty of a master to provide a reasonably safe place in which his servant shall work does not extend to safeguarding the route of every journey the servant may be required to make in fetching and carrying, whether messages or portable articles." *Bridge Co. v. Bainum,* 146 F., 367.

4. The contention of the defendant on the issue of assumption of risk is that the condition complained of was one of the ordinary risks of an employee engaged in working around water tanks. This is well founded. Any man of ordinary intelligence is charged with knowledge of the fact that in extremely cold weather there is an accumulation of ice around

water tanks, and plaintiff admitted that he was well aware of that condition.

Plaintiff testified that "you find water around the water tanks, but it is on account of the carelessness of the firemen you find it. I do not know about a plenty of it. I have been to tanks and found water around them, and that is a common thing, but it is not necessary that it should be there, but I have seen it there. In cold weather that water freezes like any other water. In weather as cold as this water that comes down out of the heavens freezes as soon as it hits the ground. I had just gotten to Cochran; had not been there over thirty minutes. I found ice there at that tank. I do not know that I found ice anywhere else that winter."

Railroad employees assume the risks incident to the falling of snow and forming of ice on and the removal of the same from the tracks and places where employees are required to work, if such removal is made in a proper and reasonable manner. Labatt (1st Ed.), page 604 (note).

The injury to the plaintiff was an accident, pure and simple, an unexpected result from a known cause, for which, in my opinion, the defendant is in no sense responsible.

MR. JUSTICE WALKER concurs in this opinion.

Affirmed 241 U. S. 290.

Cited: Morgan v. Fraternal Assn., 170 N. C. 81 (12f); *Lefler v. Lane*, 170 N. C. 183 (5g, 6g); *R. R. v. Dill*, 171 N. C. 177 (5g, 6g, 7f); *Gaddy v. R. R.*, 175 N. C. 517 (1f); *King v. R. R.*, 176 N. C. 304 (5f, 6f, 7f); *S. v. Spencer*, 176 N. C. 713 (12f); *S. v. Harden*, 177 N. C. 581 (12f); *Dixon v. Green*, 178 N. C. 209 (3f); *S. v. Bryant*, 178 N. C. 707 (12f); *Whittington v. Iron Co.*, 179 N. C. 653 (7f); *Marshall v. Telephone Co.*, 181 N. C. 299 (13j); *Capps v. R. R.*, 183 N. C. 185 (1p, 7l); *Capps v. R. R.*, 183 N. C. 185 (7j); *S. v. Walton*, 186 N. C. 489 (12f); *Cobia v. R. R.*, 188 N. C. 489, 496 (1g); *Farming Co. v. R. R.*, 189 N. C. 69 (12f); *Southwell v. R. R.*, 191 N. C. 158 (9g); *S. v. Bank*, 193 N. C. 528 (3g); *S. v. Holland*, 193 N. C. 720 (12f); *Pyatt v. R. R.*, 199 N. C. 405 (12g, 13g); *Cotton Mills v. Mfg. Co.*, 218 N. C. 563 (3f); *Wilson v. Massagee*, 224 N. C. 709, 712 (1p).

(152)

J. R. OETTINGER ET AL. v. HILL LIVE STOCK COMPANY.

(Filed 17 November, 1915.)

1. Transfer of Causes—Motions—Refusal—Exceptions—Waiver.

Where a defendant moves to transfer a cause to another county, and he is allowed to a certain day of the term to file affidavits, which he failed to do, and his motion for removal is denied, without his excepting or appealing, his conduct will waive all of his rights thereto.

2. Transfer of Causes—Court's Discretion—Appeal and Error—Interpretation of Statutes.

The transfer of a cause to another county "for the convenience of witnesses or for that the ends of justice will be promoted," is a matter within the discretion of the trial judge and not reviewable on appeal. Revisal, sec. 425.

3. Transfer of Causes—Continuances—Waiver.

A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time.

4. Same—Answer—Judgments by Default.

Where a defendant has waived his right to transfer a cause to another county or the same has been refused in the discretion of the trial court, and he has permitted the time to file his answer to expire, it is within the discretion of the trial judge to refuse his motion to file an answer later, and a judgment final by default thereof may be entered in proper instances.

APPEAL by defendant from *Lyon, J.*, at June Term, 1915, of GUILFORD.

Civil action. There was motion to remove, which was overruled. Also judgment for plaintiff by default for want of answer. Defendant appealed.

Stern & Swift for plaintiff.

W. H. Ruffin for defendant.

BROWN, J. This action is brought to recover from the defendant the sum of $743.19 with interest. In apt time, January Term, 1915, the defendant filed a motion, with affidavit, for removal of the cause to Franklin County. This motion was made under subsection 2, sec. 425, Revisal 1905. Plaintiff answered this motion and filed affidavit. Hearing on motion was at January Term, 1915. The motion for removal was denied. The defendant was given till the following Tuesday of the term to file additional affidavits. No additional affidavits were filed. No answer or demurrer was ever filed. At the request of the defendant, the cause was continued from term to term.

The case was placed on the trial calendar for the June Term. When the case was called, the defendant renewed his motion for removal. He filed one additional affidavit. The defendant's motion for removal (153) was denied. The plaintiff moved for judgment by default final. The defendant moved for time to answer. Defendant's motion denied and judgment by default final was signed.

1. The defendant, by neglecting to file additional affidavits within the time allowed by the court, and by failing to except to the judge's denial of the motion for removal, and by failing to appeal, waived all rights for removal. *Lassiter v. R. R.*, 126 N. C., 508; *Garrett, v. Bear,* 144 N. C., 26; *Ford v. Lumber Co.*, 155 N. C., 352.

2. But even if all rights for removal were not waived, the original motion for removal, January Term, and the renewal of the motion, June Term, were both made under subsection 2, sec. 425, Revisal 1905.

The Supreme Court will not review the denial by the Superior Court judge of a motion to remove "for the convenience of witnesses or for that the ends of justice will be promoted." Revisal 1905, sec. 425; *Garrett v. Bear, supra; S. v. Turner,* 143 N. C., 642; *S. v. Smarr,* 121 N. C., 670; *Lassiter v. R. R., supra.*

3. The defendant, by requesting and accepting continuances of the cause from time to time, waived all rights to have the case removed. *Garrett v. Bear, supra; Howard v. R. R.,* 122 N. C., 952.

Allowing defendant to answer at the June Term, when the time to answer had expired long since, was in the discretion of the judge, and will not be reviewed.

Affirmed.

Cited: Howard v. Hinson, 191 N. C. 367 (2f); *Gilliken v. Norcom,* 193 N. C., 354 (2g); *Howard v. Coach Co.*, 212 N. C. 204 (2f); *Cody v. Hovey,* 217 N. C. 410 (3p).

IN RE WILL OF HIRAM V. ALLRED.

(Filed 24 November, 1915.)

1. Wills—Statutory Rights—Witnesses—Presence of Testator.

The right to testamentary disposition of property rests on statute, which among other things provides that when the paper offered for probate is not in the handwriting of the testator it shall be attested by witnesses who have subscribed the same in the presence of the testator.

2. Same—Sight—Other Senses—Blind Testators.

The requirement that a paper-writing offered for probate as a will shall be subscribed by attesting witnesses thereto in the testator's presence does not exclude the operation of the testator's senses other than sight; and a blind man may make a valid will when it appears that he requested the witnesses to sign as such, who did so at the time, in the same room in which the testator was sitting, a few feet from him; that one of the witnesses had written the will, read it over to the testator, item by item, and item by item the testator said it was right, the other witness, being present, then signing the will, as stated, in the presence of the other, who watched him do so.

3. Wills—Confidential Relations—Beneficiaries — Father and Son — Presumptions—Instructions—Trials—Questions for Jury.

Where upon a caveat of a will the presumption of undue influence is relied upon as a presumption from the confidential relationship existing between the testator and the beneficiary, *semble*, that this presumption would not obtain where the father is old and blind, depending upon his son, the beneficiary, who was living with and caring for him and his property. But were it otherwise, the evidence presents a question for the determination of the jury, and a request by caveator for a peremptory instruction is properly refused. As to whether this principle applies only as to gifts *inter vivos*, *Quære*.

4. Wills—Instructions—Undue Influence—Appeal and Error—Harmless Error.

Where a will is sought to be set aside for undue influence upon the testator, and there is evidence tending to show such influence theretofore, so as to infer its existence at the time of its execution, an instruction by the court that the jury must find that it was exercised at the time is reversible error to the caveator's prejudice; but it appearing from the context of the charge in this case that it must have been operative at that time, no error is found.

APPEAL by caveators from *Rountree, J.*, at April Term, 1915, of (154) SURRY.

Proceeding to caveat a will upon the ground:

1. That the paper-writing offered for probate was not executed as required by the statute in that the subscribing witnesses did not attest it in the presence of the testator.

2. For that the testator did not have sufficient mental capacity to enable him to make a will.

3. For that the execution of the will was procured by undue influence.

It was admitted upon the trial that the testator did have sufficient mental capacity, and this ground of objection to the paper-writing as a will was abandoned by the caveators.

The testator was blind and the evidence as to the execution of the will is as follows:

R. D. Critz testified: At the time of the alleged execution of this will I lived within a mile and half of H. V. Allred. In consequence of request I went to Mr. Allred's house 27 March, 1905. He told me he wanted me to write his will for him, when I got there. He told George Allred to go and get Mr. Wolfe to witness it. I wrote the will. I wrote the will in accordance with what he told me. I first read the sections to him, and after I got the whole will wrote I went back and read it all over to him. He said it suited him; that was the way he wanted it. Mr. Wolfe came. I might have started the will before Wolfe came, got the form written, before he got there. He was there at the time these bequests were made. Mr. Allred was blind. I wrote his name and then held the pen and took his hand and placed it on the pen and made his mark that way. Mr. Wolfe was standing there present. Mr. Wolfe and myself signed as witnesses. I signed the witness as a subscribing witness at his request. Mr. Wolfe did, too. We were in the presence of each other and in the presence of Mr. Allred. He knew that we
(155) both signed the will there in his presence as witnesses. After the will was signed and witnessed, he told his son George to take it and put it away for him. H. V. Allred, in my opinion, had sufficient mental capacity to understand what property he was disposing of, the persons to whom he was giving it, and the purpose for which he was disposing of it. Subsequent to this I was called upon to write a codicil to his will, on 31 May, 1909. He sent for me and I went to his house and wrote the codicil. When I got there he sent his son George to get Mr. Pete Beamer as a witness, and while he was gone I wrote out the codicil and was waiting for him to come before I read it over to Mr. Allred. Then we both signed it as witnesses. Upon its completion I then wrote Mr. Allred's name. I took his hand and placed it on the pen and he made his mark. Mr. Beamer was there in his presence and in my presence. At that time his mental condition was good. He was sitting there by the fire. I did the writing about four feet from him; he was in front of the fire and I was to one side. I used a table to write on; it was already in the room when I got there. I read it all over to Mr. Allred. Mr. Allred had hold of the paper. I laid the paper on his lap. He signed it on his lap. It was ten or fifteen minutes after I wrote that he signed it. During that time I had the paper in my hand. I read the first will over to Mr. Allred in sections as I read it; then I read it all over to him. I was between him and the table. He did not sign on the table; I laid it down on his lap; I held to the pen and he held to the staff. I did not witness it at the same time I wrote his name. I did not sign it on his lap. No, sir. After he signed it on his lap, four or five feet from me, I turned and laid it on the table and signed it. My face was west and his was east. If his eyesight had been good he could have

seen me sign it. I was a little farther back. When the other witness signed it, Mr. Allred was at the same place. I was standing right there looking at the witness when he signed. I got up and let him sit down at the table. I stood right behind him and saw him sign it.

The caveators contended upon this evidence that as the paper-writing was signed by the testator while it was resting in his lap and was then taken by the witness and placed on a table about four feet from the testator but in the same room, and there subscribed by the witnesses with their backs to the testator, that this was not a compliance with the statute requiring the paper-writing to be subscribed by the witnesses in the presence of the testator, and they presented this contention by several prayers for instructions, which were refused, and they excepted.

The testator left surviving him six sons, three of whom are the principal beneficiaries under his will, and the caveators offered evidence tending to prove that one of these sons had never married and had lived with his father and mother and for twenty years had had charge of his farm and had managed his business, and that during the last six years this son and the other two sons who were beneficiaries under (156) the will had had control and management of his business.

The caveators requested his Honor to charge the jury as follows:

"When one is the general agent of another and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, a presumption of fraud, as matter of law, arises from a transaction between the agent and his principal for the latter's benefit, and it will be decisive of the issue in favor of the principal unless rebutted."

This prayer was refused and the caveators excepted.

The caveators also excepted for that his Honor, in his charge to the jury upon undue influence, stated that it must be an influence "exercised upon the mind of Mr. Allred at the time of making the will."

There was a verdict in favor of the propounders, and from the judgment rendered thereon the caveators appealed.

A. E. Holton and J. H. Folger for caveators.

S. P. Graves and W. F. Carter for propounders.

ALLEN, J. The right to dispose of property by will is a creature of statute and it is generally provided when the paper-writing offered for probate is not in the handwriting of the testator that it shall be attested by witnesses, who are required to subscribe the same in the presence of the testator.

There was at one time a disposition to give a restricted meaning to the term "in the presence of the testator," and to hold that it meant "in

the sight of or within the scope of the vision," but as it was soon seen that this narrow construction would prevent a blind man from making a will and that it excluded the operation of the other senses, except that of sight, a broader and more liberal construction has been generally adopted, and it is now well settled that a blind man may know of the presence of the witness without sight and that he may make a will. *Bynum v. Bynum,* 33 N. C., 632; Underhill on Wills, Vol. 1, 267; *Ray v. Hill,* 28 S. C., 302; *Reynolds v. Reynolds,* 24 S. C., 253; *Riggs v. Riggs,* 135 Mass., 238.

"In the case of a blind man the superintending control which in other cases is exercised by sight must be transferred to the other senses." *Ray v. Hill,* 28 S. C., 304.

"He must first be made sensible through his remaining senses that the witnesses subscribed in his presence." *Reynolds v. Reynolds,* 24 S. C., 256.

"It is true that it is stated in many cases that witnesses are not in the presence of the testator unless they are within his sight; but
(157) these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly if two blind men are in the same room, talking together, they are in each other's presence. . . . In cases where he has lost or cannot use his sense of sight, if his mind is not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, and within his hearing, they subscribe in his presence." *Riggs v. Riggs,* 135 Mass., 241; 1 Underhill, p. 267.

A notable instance of the execution of a will by a blind man is that of François Xavier Martin, who, after he left this State, was for thirty-one years a member of the Supreme Court of Louisiana, and during the last eight years of his service he was totally blind. His will was contested by the State upon the ground that a blind man could not make a will and also because of an alleged illegal trust, but was sustained. *S. v. Martin,* 2 La. An., 667.

Mr. Underhill, in his work on Wills, Vol. 1, sec. 196, gives the reasons for the requirement of the statute and states how it may be complied with by one who cannot see. He says: "Many of the statutes regulating the execution of wills require that the witnesses shall subscribe their names 'in the presence of the testator.' The purpose and object of such statutory regulations are to enable the testator to see that the very persons whom he has requested to attest his will do in fact attest it, and also to prevent wicked and interested parties from substituting, in the place of the paper which he has subscribed as his

last will, another paper of which he knows nothing. Presence in its widest meaning is the antonym of absence. Hence, where the statute requires a signing by witnesses in the presence of the testator a subscription to a will by the witnesses in the absence of the testator is absolutely void. Nor can such a fatal defect be remedied by a subsequent acknowledgment by the witnesses of their signature, uttered in the presence of the testator. The requirement that the will shall be signed by the witnesses in the presence of the testator does not prescribe that he shall actually see the witnesses sign the will, provided they do in fact sign it in his presence. The validity of the execution of a will cannot be made to turn upon the ability of the testator to see; for, if such were the law, it is clear that no blind man could execute a valid will. Therefore, while his intellect and hearing remain unimpaired, and he is conscious of what is going on about him, an attestation in the same room where he is, or in such proximity in another room as to be in the testator's line of vision, provided he could see, and within his hearing, will be sufficient signing in his presence."

It is not contended by the caveators that the witness did not (158) in fact sign the same paper that was signed by the testator, and if these principles are applied to the evidence we are of opinion that the will has been properly executed, as the witnesses were only four feet from him and he had the opportunity of knowing that they were signing the paper which he had signed, by the sense of hearing, and the witnesses say he knew that they signed the will there in his presence.

The principle contended for by the caveators that a presumption of undue influence arises as to transactions between a confidential adviser and general manager and the person whose agent he is, is very generally applied, but there is highly respectable authority for the position of the propounders that it only prevails as to gifts and conveyances *inter vivos* and should not obtain as to testamentary dispositions. *Lee v. Lee,* 71 N. C., 145; *In re Hurlburt,* 48 N. Y., App. Div., 91; *Bancroft v. Otis,* 24 A. S. R., 908.

In the last case cited there is a learned and instructive discussion of the question by *Justice McClellan,* of the Supreme Court of Alabama, which he concludes as follows:

"The doctrine of presumed undue influence against the dominant party, in transactions *inter vivos,* seems to us eminently sound and just. It proceeds, primarily, upon the natural assumption that a living person, having, it is to be supposed, a need for his property, or at least a desire to retain it, during life, will not part with it without a measurably adequate equivalent. Where it is made to appear that he has given it away, and that to one who occupies a position of domination in relation to him, the presumption still is that he has not freely

deprived himself of it and its use and enjoyment, but that his act was induced by the undue exercise of the influence which the beneficiary is shown to have had over him; and this presumption must be met by the donee and rebutted, else, in equity, it becomes as a fact proven—a vitiating fact in the transaction. With respect to testamentary dispositions, the primary presumption upon which the whole superstructure of the doctrine of presumed undue influence in contracts and gifts *inter vivos* rests is entirely lacking. They take effect upon the death of the donor. They involve no deprivation of use and enjoyment. There can be, with respect to them, no assumption that the donor would not voluntarily part his property, since in the nature of things it must then pass from him to others selected by himself according to the dictates of his affections, or appointed by the law of descents and distributions; and in either case without consideration moving to him. It is not out of the usual course of things, but in accordance with the exigencies of mortality, that the property should cease to be his, and should become that of another. And the very considerations which lead to suspicion,
(159) which must be removed in transactions *inter vivos*—friendship, trust and confidence, affection, personal obligation—may, and generally do, justly and properly give direction to testamentary dispositions."

The authorities are also more insistent against allowing this presumption to prevail when the confidential agent is the son of the testator. *Berberet v. Berberet,* 52 A. S. R., (Mo.), 640; *Eastis v. Montgomery,* 93 Ala., 299; *Dale's Appeal,* 57 Conn., 144; *Huffman v. Groves,* 245 Ill., 445; *Bundy v. McKnight,* 48 Ind., 516; *Marshall v. Hanby,* 115 Iowa, 322; *Furlong v. Carraher,* 108 Iowa, 493; *In re Smith's Will,* 95 N. Y., 522; *In re Hurlburt,* 48 N. Y., App. Div., 91; *Friend's Estate,* 198 Pa. St., 363; *Hook's Estate,* 207 Pa. St., 207; *In re Mason's Will,* 82 Vt., 165; 40 Cyc., 1152.

Mr. Underhill, vol. 1, sec. 145, says of this presumption: "If the testator is well advanced in years and has grown-up sons, it is almost certain that he has, prior to his death, intrusted the management of at least a portion of his estate to one of them, who, by reason of the power and control over the property of the testator thus delegated to him, occupies a position of marked trust. Can it be said that a son who, under such circumstances, received a large portion of his father's estate to the exclusion of another son, who has never manifested any ability or even inclination to care for the interests of his father, is called upon to show that he has not procured his legacy by fraud and undue influence? Or is the legal adviser of the testator, by whose industry, experience and skill his property has perhaps been protected from the assaults of those who by fraud and trickery have endeavored to deprive

him of it, called upon to rebut a presumption of undue influence because, prompted by gratitude and appreciation of his efforts, the testator has, out of a large estate, left him a small legacy? Such is not the rule that commends itself to the sense and reason of mankind."

We would be slow to admit that the presumption of fraud or undue influence prevails in a case like this where the testator was old and blind and unable to attend to his business and when the son, in the performance of a natural and moral duty, remained with him and looked after his business as he ought to have done, but it is not necessary for us to pass upon the question, because at most it could only raise a presumption of fact which would entitle the caveators to have the question submitted to the jury, and they asked his Honor to charge the jury that it would be decisive of the issue.

In *Furniture Co. v. Express Co.*, 144 N. C., 644, the Court said: "It may be well to note here that in using the terms *prima facie* and presumptive, the terms do not import that the burden of the issue is changed, but that on the facts indicated the plaintiff is entitled to have his cause submitted to the jury under a proper charge as to its existence or nonexistence and of the effect of any presumption (160) which may attach," and in *Currie v. R. R.*, 156 N. C., 424, "When the presumption is treated as one of fact the rule usually obtains that the evidence must be submitted to the jury and they must pass on its sufficiency."

The authorities in support of this position are collected in this last case, and in *S. v. Wilkerson*, 164 N. C., 436.

If the prayer had been given as requested, nothing would have been left for the determination of the jury and it would have amounted to a direction by the judge to answer the issue in favor of the caveators, when, if the position of the caveators could be sustained, that a presumption of undue influence arose, this presumption was only evidence of the fact which would have to be passed on by the jury. We therefore conclude that there was no error in refusing the prayer for instruction.

The criticism upon the statement in the charge that the undue influence must be exercised at the time of the execution of the will would be well founded if it did not appear from the context that what his Honor meant was that it must be operative at that time, and it must have been so understood by the jury.

We have carefully considered the exceptions and find

No error.

ARMSTRONG, CATOR & CO. v. E. M. ASBURY & CO. ET ALS.

(Filed 24 November, 1915.)

Judgments—Default and Inquiry—Corporations — Debts — Agreement of Shareholders—Individual Liability.

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of amount of damages open to the inquiry; and where an action is brought against a shareholder in a corporation for the payment of his ratable share due upon a corporate debt, which he, with the other shareholders, promised to pay in consideration of the creditors permitting the corporate merchandise to be sold in bulk, and the complaint alleges these facts, and a judgment by default is taken for the want of an answer, it is not open to the defendant to show that he had not participated in the meeting of the stockholders when the agreement was voted upon, and that he was not bound thereby.

APPEAL by defendant A. S. McRae from *Devin, J.*, at April Term, 1915, of STANLY.

Action brought against the defendants E. M. Asbury & Co., C. J. Mauney, C. W. Andrews, F. V. Watkins and A. S. McRae for the (161) recovery of $310.30, with interest from 1 October, 1909. The plaintiffs, among other things, allege in their complaint that the defendant E. M. Asbury & Co. is a corporation, and that C. J. Mauney, E. M. Asbury, F. V. Watkins, C. W. Andrews and A. S. McRae are its stockholders; that about 13 March, 1909, and at various times thereafter during the year 1909, at the request of the defendant E. M. Asbury &. Co., the plaintiffs sold and delivered goods and merchandise to the defendant company to the value of $628, and that when said bill for goods thus sold to the defendant E. M. Asbury & Co. was due the said E. M. Asbury & Co. was possessed of a large stock of merchandise on which there was no encumbrance, and that the plaintiffs could have collected this account in full at that time by suit and execution, but for the reason that on 25 October, 1909, E. M. Asbury, one of the stockholders of E. M. Asbury &. Co., while acting as manager, secretary and treasurer of the defendant company, wrote a letter to the plaintiffs in which he told plaintiffs, among other things, that the stockholders had had a meeting at which it was decided to sell the entire stock of goods of E. M. Asbury & Co. in bulk and pay the proceeds of the sale on the company's debts, and that at said stockholders' meeting it was agreed among the stockholders that if the money arising from the sale of the merchandise was not sufficient to pay all the debts of the company in full, then each stockholder should and would pay such an amount in proportion to the stock he held as might be sufficient to pay off all the indebtedness of

said E. M. Asbury &. Co., and especially the indebtedness due plaintiffs; that such a meeting of the stockholders was held and that such an agreement was made by the stockholders, and that such a letter was written by E. M. Asbury to the plaintiffs under the advice and instructions of the stockholders and that the said E. M. Asbury was acting within the scope of his authority as agent of the defendant stockholders individually when he wrote said letter.

The plaintiffs filed their complaint, duly verified, on 29 September, 1913.

The defendant McRae never filed any answer to the plaintiffs' complaint. At March Term, 1915, his Honor, W. A. Devin, entered judgment by default and inquiry against the defendant A. S. McRae. At May Term, 1915, the inquiry was instituted before his Honor, W. A. Devin, judge presiding, and at said term judgment was rendered by Judge Devin against the defendant McRae only, for and in the sum of $79.60, with interest from 1 October, 1909, his proportionate part of the amount due.

During the progress of the inquiry and trial at May Term, 1915, one E. M. Asbury was sworn and examined as a witness. Upon cross-examination of this witness by counsel for the defendant McRae, the defendant McRae's counsel handed witness a paper-writing, (162) marked Exhibit "A," which was admitted by both the plaintiffs and the defendant McRae as being a correct copy of the minutes of the meeting of the stockholders of E. M. Asbury & Co. referred to in the pleadings, and requested the witness to read the same, to which plaintiffs objected. This exhibit was offered for the purpose of showing that the defendant McRae was not present at the meeting of the stockholders and did not authorize Asbury to write the letter set out in the complaint and did not agree to be in any way responsible for said account, and that the stock of the said defendant McRae was not represented in said meeting. The objection of the plaintiffs was sustained and the defendant McRae excepted.

There are other exceptions taken by the defendant, but all present the same question as the one above stated. There was a verdict and judgment in favor of the plaintiff, and the defendant McRae appealed.

G. D. B. Reynolds and A. C. Honeycutt for plaintiff.

J. R. Price for defendant.

ALLEN, J. The defendant corporation, E. M. Asbury &. Co., bought goods from the plaintiff and was the original debtor, and there was then no personal liability on the defendant McRae, a stockholder of the corporation. The only claim of the plaintiff against McRae is

that he and the other stockholders, in order to obtain indulgence from the plaintiff for the corporation, entered into an agreement by which they agreed to sell the corporate property and apply the proceeds to the debts, and to pay ratably any part of the debts remaining unpaid.

In other words, the cause of action alleged against the defendant McRae is his liability upon the agreement between the stockholders, and his complaint is that he was not permitted to prove that he was not a party to the agreement. This he could not do, because he is precluded by the judgment by default and inquiry, which establishes the cause of action, that is, that he was a party to the agreement, and only leaves open the amount of the recovery. *Banks v. Mfg. Co.*, 108 N. C., 282; *Blow v. Joyner*, 156 N. C., 142; *Graves v. Cameron*, 161 N. C., 549.

The concluding sentence of the authority relied on by the defendant (*Allen v. McPherson*, 168 N. C., 436) is that "it (a judgment by default and inquiry) establishes merely that the plaintiff has a cause of action," and this brings it in harmony with the other cases.

No error.

Cited: Asbury v. Mauney, 173 N. C. 459 (p); *Mitchell v. Ahoskie*, 190 N. C. 236 (f); *Gillam v. Cherry*, 192 N. C. 198 (f); *Strickland v. Shearon*, 193 N. C. 604 (p); *Earle v. Earle*, 198 N. C. 415 (f); *Bowie v. Tucker*, 206 N. C. 59 (f); *DeHoff v. Black*, 206 N. C. 688 (f).

(163)

MARY A. POPLIN ET ALS. v. MARY HATLEY ET ALS.

(Filed 24 November, 1915.)

1. Wills—Probate—Caveat—Statutes—Clerks of Court—Pleas and Quarter Sessions—Will Appearing of Record—Presumptions—Burden of Proof.

The requirements of Revisal, sec. 3126, that the clerk of the Superior Court take in writing the proofs and examinations as to the execution of a will and to embody the substance thereof in his certificate of probate, and that the certificate thereof be recorded with the will, did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary.

2. Same—Evidence—Rebuttal.

Where a will valid upon its face is attacked for insufficiency of probate before the old court of pleas and quarter sessions, and it appears that therein an estate for life was granted to the testator's wife with remainder to two of testator's children, with a small bequest in money to the caveator; that the caveator was shown the will, received and receipted for the money devised, and the life tenant held possession of the land for her life, and since then the remaindermen have been in possession, without objection from the caveator; that the clerk of the court has not made sufficient search to find other entries bearing upon the validity of the will: *Held*, the evidence confirms the presumption in favor of the validity of the probate, instead of tending to rebut it.

3. Wills—Caveator Accepting Benefits—Estoppel.

Where the caveator has been shown the will devising the testator's lands to another, and to her a bequest in money, and accepts the money and receipts therefor, after full knowledge of all the facts, she will not be heard to impeach the validity of the will.

APPEAL by plaintiff from *Carter, J.*, at the July Term, 1915, of STANLY.

Proceeding for the partition of land, the petitioners claiming to be the owners of two-thirds thereof and that the defendants together are the owners of the other one-third. The defendants deny that the petitioners own any interest in the land and contend that they own the same in fee.

Both the petitioners and the defendants claim under Alfred Hatley, who died during the War Between the States, seized in fee of the land in controversy, and leaving surviving him his widow, Margaret Hatley, and two daughters, Mary L. Hatley, now Poplin, one of the petitioners, and Frances Hatley, who has died leaving as her only heir at law R. A. Hatley, the other petitioner, and one son, William I. L. Hatley, who has died leaving surviving him a widow, Mary Hatley, and several children as his heirs at law, who, with his widow, are the defendants in this proceeding.

On the trial the defendants offered in evidence the Record of (164) Wills, Book No. 1, p. 265, on which appears the following paper-writing:

In the name of God, Amen: I, Alfred Hatley, do make my last will and testament as follows: I give my entire estate to my wife, Margaret, during her lifetime and after the death of my wife I desire my son William I. L. to have my land and the two girls to have $50 each, to be paid to them; if not a sufficiency after the payment of my debts, I will that the said sum shall be paid out of my land by my son, William, and I appoint my wife executrix.

In testimony whereof I hereunto set my hand and seal this 17th day of September, A. D. 1862.

(Signed) ALFRED HATLEY. (SEAL)

Witness:

J. M. MCCORKLE,

D. M. MOYER.

The plaintiffs objected to the introduction of this record. The objection was overruled and the petitioners excepted. There was no probate of the will on the record and no other reference to the paper-writing except as above stated.

B. B. Coggin testified as follows:

"I am clerk of the Superior Court of Stanly County. I have searched my office thoroughly for any record of administration or executorship on the estate of Alfred Hatley, deceased, and did not find any. I have searched my offiec thoroughly for any record of administration or executorship in regard to the estate of W. I. L. Hatley, and did not find any. I have examined the files in my office for the original will of Alfred Hatley, and did not find it after a thorough search. I have made a thorough search in my offiice for a record of the court of pleas and quarter sessions pertaining to the probate of this will of Alfred Hatley, deceased, and do not find any record whatever pertaining to the probate of said will.

"I do not pretend to say that the record of the preceedings of the court of pleas and quarter sessions is complete. I found connecting dates is what I had reference to. There were different records of that court kept when they were sitting as a civil court and when they were sitting in criminal cases, etc., I found; and I could not say that I searched over all these different records."

It was admitted that Margaret Hatley, widow of Alfred Hatley, continued in possession of all of said land after the death of her husband and continued to receive and enjoy the rents and profits of the same until her death in September, 1912, and that since her death the defendants have been in possession of said land and have been enjoying the rents and profits thereof.

(165) The defendants also introduced in evidence a receipt signed by the petitioner Mary Poplin, in September, 1912, for $50 for payment on land, and also another receipt for $50 signed by R. A. Hatley for payment on land, and offered evidence tending to prove that these two amounts of $50 each were the amounts given by Alfred Hatley in his will to his two girls.

The petitioner R. A. Hatley was not examined as a witness and did not contradict the evidence of the defendants that he had received the $50 under the will of Alfred Hatley.

The petitioner Mary Poplin testified in regard to the receipts as follows:

"At the time the receipts were signed Rufe Hatley was the one who done most of the talking and I didn't have much to say. He tried to get them to have the land sold and pay up the burying expenses of their mother, but she would not do it, and he decided then that he would just take his money, and he taken his, and I told her that I wanted it fixed according to law and no hereafter about it, and she gave me the money then and Rufe Hatley signed the receipts, and she said to me, 'Are you fully satisfied?' I said, 'No, I am not; it seems to me that I ought to fare as one of the heirs out of pa's property.' I wanted my mother to have her pleasure on that place as long as she lived and I never inquired into it. She had charge and possession of all the land until her death. Her dower was never allotted to her. I claimed an interest in this land during the lifetime of my mother. I didn't want no rent from the place during her lifetime, and have not got any rents since her death. I lived there on that place till I was grown and have been living right here in Stanly County ever since except one year I lived in Anson County. My mother always told me the land was hers her lifetime to do as she pleased with it. I did not know that my father's will was on record. I first found out about the will when they fetched a copy out to my house last September two years ago. I never come to see about it. I received the $50 as stated in the receipt. It was nothing to me what land the payment was coming on. I had just received the money and they wrote out that little slip of paper. I received the money because she offered it to me, and I taken it and I thought I could hold the money till this thing was settled. The $50 can be got."

There was also evidence on the part of the defendants that the petitioners lived a short distance from the land in controversy and that they made no claim thereto until a short time before this proceeding was instituted.

There was a verdict and judgment for the defendants, and the plaintiffs appealed.

G. D. B. Reynolds and R. L. Smith for plaintiffs. (166)
H. S. Williams and R. L. Brown for defendants.

ALLEN, J. The statute now in force (Rev., sec. 3126) requires the clerk of the Superior Court to take in writing the proofs and examinations as to the execution of a will and to embody the substance thereof

in his certificate of probate and that the certificate be recorded with the will; but at the time when the paper-writing offered in evidence by the defendants as the will of Alfred Hatley was placed on the records there was no such requirement.

The court of pleas and quarter sessions then had jurisdiction of the probate of wills, and there was at that time no provision in the statute requiring the taking of the proofs in writing nor for recording the probate. Revised Code, chapter 119, section 14.

The practice was to exhibit the will before the court and offer the proofs of execution, and for an entry to be made upon the minutes of the adjudication, and the clerk, acting upon the authority of the court, then recorded the will upon the will book. In most instances he also recorded a memorandum of the proceedings before the court, but this was not done in all cases, and it appears not to have been the practice in the county of Stanly, where this action was tried.

We have, then, the case of a paper-writing which is in its regular place upon the will book of the county, and which, without a memorandum of the probate appearing thereon, was placed there legally and under rightful authority, provided the court of pleas and quarter sessions admitted it to probate.

In the absence of proof, what is the presumption as to the action of the court? It is presumed that the court did not act and did not admit the paper-writing to probate, or is the presumption to the contrary?

The paper is in its proper place on a record of the court, and it is there rightfully or wrongfully. Is the presumption that the officer who transcribed it did so legally or that he did so without legal authority? The authorities seem to be practically uniform in favor of the presumption that the officer acted regularly and in accordance with law.

"The general presumption is that public officers perform their official duty and that their official acts are regular, and where some preceding act or pre-existing fact is necessary to the validity of an official act the presumption in favor of the validity of the official act is presumptive proof of such preceding act or pre-existing fact." 22 A. and E. Ency., 1267.

"It will be presumed that public officers have been duly elected and that they have qualified; that their official acts are properly performed, and, in general, that everything in connection with the official act was legally done, whether prior to the act, as giving notice, serving
(167) process, or determining the existence of conditions proscribed as a prerequisite to legal action." 16 Cyc., 1076.

"It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act,

proof of the latter carries with it the presumption of the due performance of the prior act." *Knox County v. Bank,* 147 U. S., 91.

"The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact." *Nofire v. United States,* 164 U. S., 657.

This principle has been applied in our State in *Clifton v. Wynne,* 80 N. C., 147; *Gregg v. Mallett,* 111 N. C., 76; *Morris v. House,* 125 N. C., 556; *Cochran v. Improvement Co.,* 127 N. C., 394, and in other cases.

In *Gregg v. Mallett, supra,* the Court says: "But by the general rules of evidence certain presumptions are continually made in favor of the regularity of proceedings and the validity of acts. It presumes that every man in his private and official character does his duty until the contrary is proven. It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption. Thus it will presume that a man acting in a public office has been rightfully appointed, that entries found in public books have been made by the proper officer, and like instances abound of these presumptions."

Nelson v. Whitfield, 82 N. C., 50, is almost directly in point. In that case the records had been destroyed and the original will could not be found, and the parties claiming under the will had to rely upon proof of its contents by witnesses who had seen the will on the record, but they were not able to furnish any evidence that it had been probated or that a certificate of probate was recorded, and the Court, dealing with this question, says: "At the date of the alleged execution of the will, the courts of pleas and quarter sessions had jurisdiction of the probate of wills and were directed to order them to be recorded in proper books kept for that purpose. They were to be recorded in these books after probate had. The fact, then, that the will of Benjamin Whitfield was found in a book kept by the clerk of court of pleas and quarter sessions in accordance with the requirements of law is *prima facie* evidence of the probate of the will. *Omnia presumuntur rite acta esse.* There was evidence, then, to go to the jury of the existence of the will of Benjamin Whitfield and that it had been duly proved and recorded."

This presumption in favor of the regularity and the legality of the action of the clerk who recorded the will is sustained by the facts and circumstances appearing in evidence. The paper-writing has (168) been upon the records for more than fifty years, and it has not been challenged until a short time before this proceeding was commenced. The devisees in the will have been in the exclusive possession of the pro-

perty during this long time, and the petitioners lived within a short distance of them and knew that they were claiming and using the property as their own. The petitioners have accepted the sums of money given to them in the will and have retained it, and at the time of their acceptance, according to the evidence of the only one of the petitioners who was examined, a copy of the will was present.

We are therefore of opinion that the paper-writing was properly admitted in evidence as the will of Alfred Hatley, and if evidence was offered in rebuttal of the presumption that it was properly probated, the weight of the evidence was for the consideration of the jury. It appears, however, that this rebutting evidence upon which the plaintiffs rely is not complete in that the clerk who made an examination of the records for the purpose of seeing if a minute of the probate could be found, admitted that he had not searched over all the different records.

We might also rest our decision upon the ground that the petitioners, according to all of the evidence, and after a full knowledge of the facts, and when a copy of the will was present, accepted benefits under the will, and if so, they would not be heard to impeach its validity. *In re Will of Lloyd,* 161 N. C., 559.

We find no error in the record.

No error.

Cited: Howell v. Hurley, 170 N. C. 403 (1p).

THE MEYERS COMPANY v. J. T. BATTLE.

(Filed 24 November, 1915.)

1. Bills and Notes—Negotiable Instruments—Endorser—Presumptions—Holder—Interpretation of Statutes.

One placing his signature on the back of a negotiable paper is deemed an endorser thereof, and under the express terms of the statute should "clearly indicate by appropriate words his intention to be bound in some other capacity," when such exists, in order for him to avail himself thereof as a defense in an action brought by a holder in due course.

2. Bills and Notes—Corporations—Treasurer—Endorser—Presentment for Payment—Dishonor—Notice.

Where the treasurer of a corporation endorses the corporate note, payable at a certain bank, and at its maturity the corporation has no funds at the bank: *Held,* it is not necessary, in an action upon the note by a holder in due course against the endorser, that the note should have been presented to the bank for payment, or that the treasurer endorsing

it, being fixed with notice of the insolvency of the maker, should have had notice of dishonor.

APPEAL by plaintiff from *Lyon, J.*, at the April Term, 1915, of (169) GUILFORD.

Civil action tried upon these issues:

1. Did the defendant place his signature upon the notes sued on as original promisor and not as indorser? Answer: Yes.

2. Were the notes sued on properly and legally presented for payment? Answer: No.

3. Was notice of dishonor and nonpayment given to defendant, as required by law? Answer: Yes.

4. Was presentment for payment waived on the part of the defendant? Answer: No.

5. Was notice of dishonor and nonpayment waived on the part of defendant? Answer: Yes.

6. What, if anything, is the defendant due and owing the plaintiff because of the note due 6 April, 1910? Answer: $130, with interest from 6 April, 1910.

7. What, if anything, is the defendant due and owing the plaintiff because of the note due 6 May, 1910? Answer: $140.75, with interest from 6 May, 1910.

In apt time motion to nonsuit was made and renewed. His Honor reserved his judgment and submitted the issues. After the verdict was rendered, he set it aside and granted the motion to nonsuit. Plaintiff appealed.

Brooks, Sapp & Williams for the plaintiff.

Thomas C. Hoyle for defendant.

BROWN, J. This action is brought to recover of the defendant as indorser on two notes executed by the Southern Trading Stamp Company by J. T. J. Battle, payable at the Commercial National Bank, and indorsed by said Battle by writing his name across the back.

The plaintiff undertook to prove by parol evidence that defendant signed as an *original promisor* and not as an indorser. We suppose by the term "original promisor" is meant that defendant signed either as principal or surety, so as to dispense with notice of nonpayment as well as presentation in order to charge him.

We think his Honor erred in admitting such evidence. The statute (Rev. 2212, 2213) declares that a person placing his signature upon an instrument, otherwise than a 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. It is so held in *Perry v. Taylor,* 148 N. C., 362, and *Houser v. Fayssoux,* 168 N. C., 1.

There is nothing in or on the notes sued on which indicates that the defendant intended to be charged other than as indorser. Of
(170) course, this does not prevent an indorser from showing that his indorsement was an accommodation indorsement or from showing the relation of indorsers as between themselves.

His Honor erred, however, in sustaining the motion to nonsuit, as well as in instructing the jury to answer the second issue "No."

There is abundant evidence that the notes were presented for payment to the maker's office and evidence from which it may be inferred that they were presented at the Commercial National Bank. There is evidence that the maker was utterly insolvent when the notes fell due and had no funds at the bank with which to pay the notes. The defendant was treasurer of the company and is, of course, charged with knowledge of that fact.

Presentment and demand at the specified bank are necessary in order to charge a drawer or indorser in the absence of some good and sufficient reason for failing to make presentment there. One of those reasons is that the maker had no funds at the bank to meet the obligation. If the maker of a note, payable at a bank, has no funds in the bank when it falls due, demand of payment there is unnecessary. *Sherer v. Bank,* 33 Pa. St., 134; 7 Cyc., 988, notes.

The judgment of nonsuit is set aside.

New trial.

Cited: Gillam v. Walker, 189 N. C. 193 (1d); *Dillard v. Mercantile Co.,* 190 N. C. 227 (1d); *Busbee v. Creech,* 192 N. C. 500 (1f, 2b); *Wrenn v. Cotton Mills,* 198 N. C. 91 (1f); *Trust Co. v. York,* 199 N. C. 627 (1f).

PHILIP NELSON v. SOUTHERN RAILWAY COMPANY.

(Filed 24 November, 1915.)

Railroads—Master and Servant—Safe Place to Work—Pedestrians—Defect in Crossties.

Where the roadbed of a railway company is in good condition for the operation of its trains it does not ordinarily owe a duty to its employees to see that the crossties are sufficiently sound for their safety in walking along the track in the performance of their duties; and it is held in this case that it was not responsible in damages to its civil engineer for an injury received by him while locating a sidetrack, by reason of a rotten

place in a sill giving way under his weight, causing his foot to slip down about five or six inches to the ballast of the road, resulting in his injury; for such an accident is not attributable to the negligence of the master in failing to provide his servant a safe place to work, or to the want of exercising ordinary care in anticipation of such result.

APPEAL by defendant from *Lyon, J.*, at the April Term, 1915, of GUILFORD.

Civil action tried upon these issues:

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

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

3. Did the plaintiff assume the dangers and risks, as alleged in (171) the answer? Answer: No.

4. What damages, if any, is plaintiff entitled to recover? Answer: $6,500.

From the judgment rendered the defendant appealed.

Brooks, Sapp & Williams for the plaintiff.

Wilson & Ferguson for the defendant.

BROWN, J. On 26 June, 1914, the plaintiff, being at that time a civil engineer for the defendant, went to Keysville, Va., to make surveys for a sidetrack. The superintendent met him there and showed him where the track was to be located. The plaintiff then went to work on his survey. He went over the track and marked stations on the rails 100 feet apart, and then located the sidetracks and took some levels. After this was finished he walked back over the track to check the stations. He testified that about three or half-past three in the afternoon he was walking along the track between the rails checking these stations with his notebook. Afte passing station 21, he stepped upon a crosstie from which a small piece 1½ inches by 6 inches "V" shaped, shivered off under his weight. His foot slipped down between the ties into a space about five or six inches deep from the top of the tie to the ballast. He stumbled, fell and dislocated his knee cap.

The principle of law upon which plaintiff rests his case is that defendant owed him a duty to provide him a reasonably safe place to do his work. The plaintiff admits that he could have done his work by walking outside of the track on the ground as well as between the rails on the ties, and that the track was in perfectly safe condition for the operation of trains and for all purposes for which a railroad track is intended.

From the circumstances in evidence, we are unanimously of the opinion that the injury inflicted on plaintiff was an accident, pure and simple, and unexpected and unforeseen result of a known cause, which ordinary foresight and precaution by defendant could not guard against.

As was remarked in the consideration of this case, the injury was as much the result of an accident as the hammer case (128 N. C., 264), or any other cases involving accidental injuries brought before us. To hold otherwise would make the defendant an insurer against all possible injury, and the master is not an insurer of the servant's safety.

All that can be required of the master is that he shall use due and reasonable diligence in providing safe and sound machinery, in providing a safe place, and in the selection of fellow servants of competent skill and prudence, so as to make it reasonably probable that in-
(172) jury will not occur in the exercise of the employment. Labatt's Master and Servant (2 Ed.), Vol. 3, sec. 919; *Nail v. Brown,* 150 N. C., 535.

Railway v. Reynolds, 20 S. E. 70, is on all-fours with this. In that case a conductor had gone back on the track for some necessary purpose, after stopping his train. He walked across a trestle and stepped on a crosstie on the top of which was a small bit of decayed sap, "V" shaped and seven inches long, which under the pressure of his foot shivered off, causing him to fall and sustain serious injury. The Court said: "The real and immediate cause of this *accident* was the slipping of his foot upon the crosstie because of the giving way of the little piece of decayed sap upon its edge."

Again the Court proceeds to say: "It did not appear that this crosstie was not otherwise sound and in all respects sufficient and suitable for the use for which it was intended. *It certainly was not the purpose of the company, in having ties, to make a way for employees to walk upon, but to make a safe roadbed for the running of its trains.* The simple truth is that the injury the plaintiff received was a mere casualty incident to the ordinary risks which he assumed in accepting his employment. This seems to plain for argument. Accidents will happen, not only in the best regulated families, but upon the best regulated railways as well, and to allow the recovery to stand in the present case would be holding the company liable for the consequences of a mere accident for which it is in no fair view responsible."

Other cases supporting this view are *R. R. v. Rieden,* 107 S. W., 665; *Kerrigan v. R. R.,* 194 Pa. St., 98.

To require of a railroad company to discover every little "doty place" in every one of its thousands of crossties in order that its employees of every class may walk with absolute safety on them would demand of it a degree of care and diligence almost beyond human endeavor. We are

of opinion that the motion to nonsuit should be granted. It is so ordered. Reversed.

Cited: Taylor v. Lumber Co., 173 N. C. 117 (d).

JAMES A. TURNER AND FANNIE L. TURNER, HIS WIFE, v. NORTH CAROLINA PUBLIC-SERVICE COMPANY ET ALS.

(Filed 24 November, 1915.)

1. **Municipal Corporations—Franchises—Public Utilities—Street Railways.**

A city or town may grant a charter under the general provisions of Revisal, sec. 2916 (6), to a corporation to build a street railway along certain of its streets for the purpose of transporting passengers and freight, upon reasonable terms, the words "public utilities" including within their meaning enterprises of this character.

2. **Same—Injunction—Work Completed—Action at Law—Damages—Allegations.**

Where an order restraining the building of a street railway has been refused and the work completed, the Supreme Court, on appeal, will not uselessly enjoin its completion, or the running of a few cars thereon, but will leave the plaintiff his action for damages to be ascertained at the final hearing, in the absence of allegation of irreparable or serious injury.

APPEAL by plaintiffs from *Lyon, J.*, at chambers, 12 April, (173) 1915; from GUILFORD.

Civil action, heard upon a motion to continue a restraining order theretofore issued until the final hearing. His Honor dissolved the restraining order and the plaintiffs appealed.

W. P. Ragan, King & Kimball, William P. Bynum for plaintiffs.

Roberson, Barnhart & Smith, Peacock & Dalton, and Brooks, Sapp & Williams for defendant.

BROWN, J. The plaintiffs seek to enjoin the defendants from constructing and operating a railroad along Russell and other streets in the city of High Point, and also to restrain the defendants from moving freight cars over the said track.

The facts disclosed by the record appear to be that the defendant the city of High Point, on motion of this plaintiff, a member of the board of aldermen, by a unanimous vote, granted a franchise to one Van Brunt and associates to build a street railway in said city for the pur-

pose of transporting passengers and freight by electricity, the location and construction of the said railway to be subject to the general supervision of the city. The public was protected by special provisions, limitations and conditions unnecessary to set out.

The said Van Brunt and his associates, not having performed all the conditions required, on 9 February, 1909, the board of aldermen granted the same franchise to John Leddy and others, who had purchased from the said Van Brunt and others all their rights therein. This franchise was duly assigned to the defendant, the North Carolina Public-Service Company, which has built and put in operation several miles of said railway in said city in accordance with the conditions, limitations and restrictions of the said franchise. In 1911 the board of aldermen, or city council, as the authorities are now designated in the new charter of said city, agreed that the public-service company might build certain additional lines of street railway within the city limits.

The defendant, the Carolina and Yadkin River Railway Company, has entered into a contract with the public-service company whereby certain freight cars, not more than two at a time, are to be pulled by the motive power of the public-service company so as to reach a number of industrial plants located in the city. By this method a large (174) number of drays, wagons, motor trucks and other heavy vehicles, necessary under former conditions to transport the large local shipments within the city, has been largely reduced.

It is contended that the city of High Point had no power to grant the franchise complained of to the public-service company. It is not claimed that the charter of the city, at the time the franchise was granted, authorized it, but it is contended that the authority is given by section 2916 of the Revisal, subsection 6, which reads as follows:

"A city or town is authorized to grant upon reasonable terms franchises for public utilities, such grants not to exceed a period of sixty years, unless renewed at the end of the period granted."

We think this contention is well founded. The words "public utilities" as used in the act are evidently intended to embrace such corporations as the public-service company. It is not a private corporation exclusively. It is affected with a public use and is under the control of the State. The term "public utilities" in an extended sense includes a great many matters of general welfare to the State and its communities. Within its well-established meaning, the term includes railways, both steam and street, whatever may be the motive power. It includes telegraph and telephones, waterworks and gasworks, electric lighting plants, as well as street railways. 3 Dillon, sec. 1290; 4 Words and Phrases, p. 35. A company which carries for the public all kinds of express matter between a city and suburban points is held to be en-

gaged in the public service and is a public utility and not strictly a private business. *Dulaney v. Railways,* 104 Md., 423.

It is contended by the plaintiff that the construction of this track, or the running of freight cars upon it, is additional servitude for which as an abutting property owner he is entitled to additional compensation. This question is discussed by the Supreme Court of Maine in *Taylor v. R. R.,* 91 Me., 193, but we will not consider it upon this appeal. The injunction has been dissolved, and it appears that since its dissolution the laying of the track on Russell Street, on which the plaintiff resides, has been completed, as well as many of the other connections. It would be futile now to grant an injunction against the construction of a railroad which has already been constructed under the authority of the city; or to enjoin the movement of a few freight cars over it. There is no allegation of irreparable damage or that the plaintiffs are suffering serious injury by the operation of these cars. In the absence of anything of that sort, the court will not enjoin public enterprises and improvements which make, in the opinion of its authorities, for the welfare of the community. If the plaintiffs are entitled to any damages or any relief they will have an opportunity to assert their claims when the case is tried on the final hearing.

Affirmed.

(175)

JESSE GRAVES ET ALS. v. J. W. CAUSEY ET ALS.

(Filed 24 November, 1915.)

1. Limitation of Actions—Deeds and Conveyances—"Color"—Registration—Possession—Ouster—Notice.

Where the deceased owner of lands leaves a widow, who, without allotment of dower, remains on the land until her marriage, and then conveys them, with her husband, in fee, for a valuable consideration, and the grantee has his deed recorded and enters into possession and builds upon and exclusively uses the lands, the registration of the deed and the occupancy of the lands put the heir at law of the original owner upon notice of the act of ouster and hostile possession, and the continuous possession by the grantee, or those claiming under him, for seven years, under the deed as color, will ripen the title.

2. Same—Widow—Heirs at Law.

The possession of the widow of the deceased owner of lands is not hostile to his heirs, but subservient to their title, and those claiming under the widow generally stand in no better position unless there has been some open, unequivocal act on their part indicating that their possession is adverse.

3. Statute of Limitations—Dower—Heirs at Law.

The possession of the widow of her dower interest in her deceased husband's lands is but an elongation of his estate, and is not adverse to his heirs, but in privity with them; and the statute of limitations will not begin to run adverse to them until her death.

APPEAL by defendant from *Shaw, J.*, at September Term, 1915, of GUILFORD.

Civil action to recover land. From the judgment rendered the plaintiffs and the defendant Causey appealed.

S. B. Adams and R. C. Strudwick for the plaintiffs

R. D. Douglas and Brooks, Sapp & Williams for the defendants.

BROWN, J. Henry Lindsay, born a slave, owned the land in controversy. He died in 1880, leaving his sister, his only heir at law, from whom the land descended to plaintiffs. Following the death of Henry Lindsay, his widow, Henrietta, remained in actual possession of the property until the execution of the deed hereinafter mentioned. No dower was ever assigned or allotted to her. Some time prior to 1890 Henrietta Lindsay married David Johnson. On 29 January, 1890 Henrietta Lindsay and her then husband, David Johnson, executed and delivered a fee-simple deed to Robert W. Causey for this land, reserving in the deed a small portion of the land as a home for the grantors for life. This deed was recorded 29 January, 1890, and at once the grantee went into actual possession of all the land, except the part reserved by the grantors for their lives, and the grantee and those
(176) claiming under him have remained in actual possession ever since.

R. W. Causey, the grantee, executed a deed in fee to defendant J. W. Causey, registered 5 March, 1890, and other defendants claim by deeds from him. Henrietta Johnson and her husband, David, are dead, the former dying in 1914 prior to commencement of this action. The Court adjudged that the plaintiffs were not entitled to recover any of the land except that portion described in the deed from Henrietta Johnson upon which the estate for life was reserved. From this judgment plaintiffs and defendant Causey appealed.

PLAINTIFF'S APPEAL

The judge below held that the deed from Henrietta Johnson and her husband to Robert W. Causey of 29 January, 1890, and the deed from Robert W. Causey to J. W. Causey of 5 March, 1890, under whom the other defendants claim all the land except that embraced in the reservation, were good as color of title and that the grantees therein had

been in actual adverse occupation since that date, and that plaintiffs were not entitled to recover of these defendants. In so holding, we think the judge correct. That the deeds, admitted to be in proper legal form are color of title is fully sustained by many precedents. *Tate v. Southard,* 10 N. C., 119 *Smith v. Proctor,* 139 N. C., 315.

That the possession was adverse to plaintiffs as well as all the world is beyond question. The deeds were put upon record and purported to convey a fee-simple estate for a valuable consideration. These defendants thus gave notice to the world that they claimed the land in fee, and from the moment they took possession they were subject to suit and eviction by the plaintiffs. They at once entered on the land and built on it and in every [way] manifested that they claimed to own the land in fee. There is nothing to qualify and explain this possession, and the law presumes it to be adverse, and being adverse, it amounts to disseizin of the heirs. *Alexander v. Gibbons,* 118 N. C., 796; *Faggard v. Bost,* 122 N. C., 523; *Brown v. Morisey,* 124 N. C., 296.

The widow does not hold adversely to the heirs, but in subserviency to their title, and those claiming under the widow generally stand in no better position unless there has been some open, unequivocal act on their part indicating that their possession is adverse.

Upon this subject, *Ruffin, J.,* said in *Malloy v. Bruden,* 86 N. C., 258: "Upon the decease of the ancestor, Archibald Fairley, the title and the possession of the land, subject to his widow's right to dower, was cast upon his daughter, Mary Ann, as his only heir; and upon the assignment of her dower, the widow took possession, not adversely to the heir, but in subserviency to her title, and so continued to hold; and neither she, herself, nor any one claiming under her, could acquire any right against the heir by virtue of the statute of limitations, (177) at least not without some open, positive change of possession, accompanied with some manifestation of an unequivocal purpose to hold adversely to her, such as would have subjected the party coming in under such change of possession to an action at the instance of the heir."

In other jurisdictions the relation of the vendee of the widow to the heirs is held to be such as not to estop him from holding possession of the land adversely to the heirs of the deceased. *Cooper v. Watson,* 73 Ala., 252; *Irving v. Libbetts,* 26 Pa. St., 477.

The judgment of the Superior Court upon the plaintiffs' appeal is Affirmed.

DEFENDANT J. W. CAUSEY'S APPEAL.

This defendant claims that part of the land reserved in the deed from Henrietta Johnson to Robert Causey, under whom J. W. Causey claims. Henrietta remained in possession of this part of the land until her death in 1914. As to this part the judge held that her posses-

sion was not adverse to the heirs of Henry Lindsay, the plaintiff, and that they are entitled to recover. This ruling meets with our approval. The possession by the widow of this reservation was never adverse to the plaintiffs. She was entitled to dower and to remain on the land during her life. Her estate was but an elongation of her deceased husband's estate, and as widow she held in privity with and not adversely to the heirs. *Everett v. Newton,* 118 N. C., 921; *Malloy v. Bruden,* 86 N. C., 258.

As Robert Causey and his grantee, J. W. Causey, held subject to her life estate, and as neither of them was ever in possession of this reserved portion of the land, they had no possession to ripen their color into a good title. The plaintiffs could not be put to their action against them because the plaintiffs had no cause of action until the widow died.

The judgment of the Superior Court upon the defendant Causey's appeal is

Affirmed.

Cited: Rook v. Horton, 190 N. C. 183 (3p); *Owens v. Lumber Co.,* 210 N. C. 512 (1g).

PAULINE JARRELL, ADMINISTRATRIX, v. JOHN W. DYER ET ALS.

(Filed 24 November, 1915.)

Wills—Interpretation—Trusts and Trustees.

The mother of the testatrix having previously devised to her in fee certain lands, and the testatrix, having died seized and possessed of this and other property, left a will which gave to her mother, about eighty years of age, "all the property recently deeded to me by her, also all my other property, that she may administer it to the use of my children." *Held,* by this devise the mother took all of the property, that theretofore conveyed by her as well as that otherwise owned by the testatrix, to be administered for the benefit of the testatrix's children, without power of disposition by will or otherwise, except as may be conferred by legal proceedings instituted for that purpose; and evidence as to the close relation having existed between the testatrix and her mother has no effect upon the express terms of the devise and bequest.

(178) APPEAL by plaintiff from *Justice, J.,* at September Term, 1915, of GUILFORD.

Civil action for the construction of the last will and testament of Emma J. Simmons, deceased, and for the advice of the court in regard thereto, tried upon facts agreed. From the judgment rendered the plaintiff appealed.

Brooks, Sapp & Williams for the plaintiff.
Thomas C. Hoyle and Morehead & Morehead for the defendants.

BROWN, J. Emma J. Simmons died in the county of Guilford 16 April, 1914, leaving a last will and testament in manner and form as follows:

I, Emma J. Simmons, being of sound mind, do hereby will and bequeath to my mother, Pauline E. Jarrell, all the property recently deeded to me by her, also all my other property, that she may administer it to the use of my children.

This 14 April, 1914.

It is unnecessary to consider the facts as found by his Honor as to the manner of life of the testatrix and her mother and as to how they transacted their business. The construction of this will presents no complications. The language is plain and direct. The testatrix evidently bequeathed to her mother all of her property, including that which had been conveyed to her by her mother, as well as that which she derived from other sources, in trust that the mother may use, control and administer it for the benefit of the testatrix's children. This confers upon the mother no power of disposition by will or otherwise, except as may be conferred upon her by legal proceedings instituted for that purpose. *Crudup v. Holding,* 118 N. C., 230-231; *Young v. Young,* 68 N. C., 309; *Little v. Bennett,* 58 N. C., 160.

Affirmed.

Cited: Laws v. Christmas, 178 N. C. 363 (f); *Brinn v. Brinn,* 213 N. C. 287 (f).

(179)

J. R. BELL, ADMINISTRATOR, v. THE CITY OF GREENSBORO.

(Filed 24 November, 1915.)

Municipal Corporations—Cities and Towns—Streets—Bridges—Approaches—Overflow of Water—Negligence—Trials—Questions for Jury.

Where a city has built approaches to a bridge over a stream on its street with embankments on one side tending to increase the water in its flow under the bridge, which otherwise would have been too much, and had left a depression on the approach on the other side across which the water would flow during rainstorms of such character as could reasonably have been expected to occur, and which would not have been likely to have flowed there had the approaches on both sides been graded the same and to the same level, and which grading had partially been done by the

city authorities, but left incompleted: *Held*, evidence of actionable negligence of the city that, upon the plaintiff's intestate coming from school and attempting a second time to cross, she was swept from her feet by waters rushing across this depression caused by an overflow of the stream from a rainstorm of not unusual occurrence, and drowned.

APPEAL by defendant from *Lyon, J.*, at January Term, 1915, of GUILFORD.

Civil action tried upon these issues:

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

2. What damage, if any, is plaintiff entitled to recover? Answer: $1,000.

From the judgment rendered defendant appealed.

John A. Barringer for plaintiff.

A. W. Cooke for defendant.

BROWN, J. Plaintiff sues to recover for the death of his intestate, caused, as alleged, by failure of defendant to properly construct and keep in repair North Green Street, which crosses Buffalo Creek in the northwestern part of the city.

The evidence tends to prove that the defendant constructed the bridge across Buffalo Creek about twelve feet above the water and on the side opposite the city of Greensboro made a long embankment about eight or ten feet high, level to the foot of the hill beyond, and on the side of the bridge next to Greensboro constructed an embankment part of the way, but made it incline to a sag between the bridge and the Cape Fear Railroad spur going to Cone Cotton Mills, so that whenever a heavy rain fell the water would run in great volume, force and rapidity across the said street at the said depression. This embankment inclined from the railroad spur toward the bridge about fifty or a hundred feet to the depression and there was an incline from the bridge back toward the railroad spur, a decline of considerable distance which made the sag as least four feet below the bridge, the embankment being at the sag about a foot above ground.

(180) The defendant originally constructed the street and embankment. It is undeniable that it was the city's duty to keep it in a reasonably safe condition, and, if necessary, to make the embankment level with the one on the opposite side of the creek.

Plaintiff contends that it was negligence to allow the depression to remain when it was obvious that the waters of the creek would likely rise and run across the street in case of heavy rains and make it dangerous for persons passing along the street.

The evidence tends to prove that plaintiff's intestate, his daughter Anna, seven years of age, was drowned in consequence of the flooding of the street. She and many other school children passed along this street daily to the public schools of defendant. The street was one of its thoroughfares and used by many people, both day and night. Plaintiff's intestate went to school on 15 March, 1912, and started home as usual along this street. A heavy rain had fallen while she was in school and when she got to the sag or depression on North Green Street a great volume of water was running across it. She stopped and was heard to call out, and then she undertook to wade across this volume of water on the street, and when she got about midway it washed her down with such violence that she was drowned and her body floated on down 75 yards north of the said street, where it was found.

The motion to nonsuit was properly overruled. The evidence tends strongly to prove that the defendant had or was fixed with knowledge of this dangerous condition, and that it could have remedied it by raising the embankment level with the height of the bridge on the side next to the city.

There is evidence tending to prove that previously rains had fallen frequently quite as heavy as the one on 15 March, 1912, when the intestate was drowned. There is evidence that the outlet under the bridge is insufficient to carry off the water on occasions of heavy rains, such as may be reasonably anticipated in that section; that the embankment on the opposite side of the creek from Greensboro had diverted the natural flow of the water from the large watershed above to the south side of the said street, and thereby the volume of water was increased which was required to be carried off in the channel; that the street from the railroad spur to the foot of the hills on the other side ran through a long flat piece of land and the water had been seen from time to time to cover the whole bottom before this occasion of the death of the intestate of the plaintiff; that the city has partially filled up the said sag since the death of the intestate.

There is no fault in the charge, either of commission or omission, that the defendant can reasonably complain of. The defendant's contention was presented to the jury clearly and fairly, as the following extract shows:

"But if you should find that the city constructed the street and (181) maintained it as it was, and that that was a reasonably good street, such a street as a reasonably prudent man ordinarily would have made, under the circumstances, and that the occurrence was caused by an extraordinary rainfall, such a one as would not be anticipated or expected by the authorities in providing their streets and roads, the city

would not be liable and it would be your duty to answer the first issue 'No.'"

We have examined the other assignments of error, and think they are without merit.

No error.

Cited: Graham v. Charlotte, 186 N. C. 664 (f); *Radford v. Asheville,* 219 N. C. 190 (f).

D. A. LEFLER ET AL. v. C. W. LANE & CO.

(Filed 24 November, 1915.)

1. Pleadings — Amendments — Court's Discretion — Commencement of Action.

An amendment to a complaint is allowable in the reasonable discretion of the trial judge unless its effect is to add a new cause of action or change the subject-matter thereof, and an objection cannot successfully be urged on these grounds where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated; and when properly allowed, it shall have reference by relation to the original institution of the suit. Revisal, sec. 507 *et seq.*

2. Same—Subcontractors—Railroads—Contracts—Correction—Equity.

Where the written contract with a subcontractor prevents the plaintiff from showing that he was entitled to recover for clearing a railroad right of way the full acreage between two points thereon, and not for only such parts as he had actually cleared, it is within the discretion of the trial judge to allow him, in his action, to amend his complaint by alleging that a stipulation of the contract, permitting such recovery, was omitted from the written contract by the mutual mistake of the parties.

3. Evidence—Contracts—Subcontractor—Matters at Issue.

The plaintiff sues the subcontractor of a railroad company for the amount due him under a contract to clear off a certain portion of the right of way, claiming a lien for the amount due from the principal contractor, and the amount of recovery was made to depend upon whether the plaintiff was to be paid by the defendant for clearing the total area or only such part as he actually cleared, at the stated price per acre. It is held, in this case, that the contract between the railroad and its subcontractor was directly put at issue, and was admissible in evidence for that and the further reason that it tended to establish the reasonableness of the plaintiff's contention, in showing the amount allowed the defendant for this work.

APPEAL by defendant from *Lyon, J.,* at May Term, 1915, of DAVIDSON.

Civil action to recover an amount alleged to be due for clearing off a railroad right of way.

The jury rendered the following verdict: (182)

1. Was it agreed between plaintiffs and defendant that the plaintiff should have $30 per acre for entire area of right of way of Carolina and Yadkin River Railway Company from Station 97 to High Rock, including "Y," as alleged in the complaint, and according to survey already made? Answer: Yes.

2. Was the provision that plaintiffs were to be paid for the entire area of right of way from Station No. 97 to High Rock, including "Y," according to survey of engineer as theretofore made, at $30 per acre, omitted from the contract by mutual mistake of the parties, as alleged in the complaint? Answer: Yes.

3. What is the area cleared over by plaintiffs for defendant under the contract? Answer: Sixty-six acres.

4. What was the number of acres of right of way cleared by plaintiffs for defendant? Answer: Sixty-six acres.

5. What amount is defendant company indebted to plaintiffs for the work of clearing the right of way, as alleged in the complaint? Answer: $680.

6. From what date are plaintiffs entitled to interest? Answer: From 1 November, 1912, to 1 June, 1915.

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

Emery E. Raper and Paul R. Raper for plaintiffs.

Phillips & Bower for defendant.

HOKE, J. This action was instituted by plaintiffs, subcontractors, to recover an amount alleged to be due for clearing off a portion of the right of way of the Carolina and Yadkin River Railroad, in which defendant Lane & Co. was the principal contractor and sublet to plaintiff the portion of the work sued for. The railroad company was made defendant for purpose of enforcing and establishing a subcontractor's lien, and the complaint contains averments looking to the enforcement of the claim in that aspect.

As between plaintiffs and defendant Lane & Co., the complaint was originally drawn on the idea that plaintiff, under the contract as originally drawn, had the right to recover at so much per acre for the entire surface area of the distance cleared off, while defendant contended that the contract only conferred the right to recover for the amount actually cleared within the given area. There was recovery according to plaintiff's position and, on appeal, a new trial was granted, the Supreme

Court holding that the contract as drawn, by correct interpretation, conferred a right of recovery only for the acreage actually cleared. See case, reported in 167 N. C., 267.

(183) The opinion having been certified down, plaintiff, by leave of court and over defendant's objection, was allowed to amend his complaint so as to allege that the agreement between the parties gave plaintiff the right to recover for the entire surface area and that the stipulation to that effect was omitted from the contract by the mutual mistake of the parties.

This issue having been answered in plaintiff's favor and judgment entered, defendant objects to the validity of the trial chiefly on the ground that the court had no right to allow the amendment.

Under the statutes regulating our present system of procedure, Revisal 1905, sec. 507 *et seq.*, and numerous decisions construing the same, the power of amendment has been very broadly conferred and may and ordinarily should be exercised in "furtherance of justice," unless the effect is to add a new cause of action or change the subject-matter thereof, and our cases on the subject hold that, where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit. *Renn v. R. R., ante,* 128; *Joyner v. Early,* 139 N. C., 49; *Lassiter v. R. R.,* 136 N. C., 89; *Nims v. Blythe,* 127 N. C., 325; *Parker v. Harden,* 122 N. C., 111; *King v. Dudley,* 113 N. C., 167; *Kron v. Smith,* 96 N. C., 389; *Ely v. Early,* 94 N. C., 1. This last citation being not dissimilar to the amendment allowed in the present instance.

In illustration of the principle, it was held in *Parker's case, supra:* "It is in the discretion of the trial judge to allow an amendment which neither asserts a cause of action wholly different from that set out in the original complaint nor changes the subject-matter of the action nor deprives the defendant of defenses which he would have had to a new action."

And in case of *Smith v. Kron:*

"1. The distinguished feature of the practice introduced by the Code is to have actions tried on their real merits, and avert a failure of justice from some defect that can be remedied by amendment, without prejudice to the other party.

"2. The Superior Court has the power to allow amendments at any time, either in the allegations of the complaint or in making new parties, except where the proof establishes a case wholly different from that in the pleadings, or where the amendment would change the subject-matter of the action."

In our opinion these authorities are in full support of his Honor's decision allowing the amendment, and the objection of the defendant must be overruled. It was further objected that his Honor made an erroneous decision in allowing the introduction of the contract (184) between the railroad company and the defendant, showing, among other things, the amount allowed the principal contractor for clearing right of way. This document, showing the entire contract between the railroad company and Lane & Co., was directly put in issue by the pleadings, and, apart from this, its contents showing the amount allowed the principal contractor for this very same work were relevant on the first and second issues, tending, as they did, to show that the claim of plaintiff as to the terms of the contract sued on and the mistake in reference to it was neither unreasonable nor improbable.

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

No error.

Cited: R. R. v. Dill, 171 N. C. 177 (1f); *McLaughlin v. R. R.,* 174 N. C. 186 (1f); *Gladsden v. Craft,* 175 N. C. 361 (1f); *Goins v. Sargent,* 196 N. C. 481 (1f); *Morris v. Cleve,* 197 N. C. 266 (1f); *Bridgeman v. Ins. Co.,* 197 N. C. 601 (1f); *Street v. McCabe,* 203 N. C. 82 (1f); *Clevenger v. Grover,* 212 N. C. 17 (1f); *Silver v. Silver,* 220 N. C. 193 (1g); *McDaniel v. Leggett,* 224 N. C. 810 (1f); *Webb v. Eggleston,* 228 N. C. 578 (1j).

W. L. SMITH v. SOUTHERN RAILWAY COMPANY.

(Filed 24 November, 1915.)

Master and Servant—Duty of Master—Safe Place to Work—Negligence—Trials—Evidence.

In this action to recover damages for a personal injury, there was evidence tending to show that plaintiff, an employee of a railroad company, was engaged, under the order and direction of the defendant's foreman, in placing iron bars into a rack containing eight bins, one above the other, the topmost being 10 feet above the ground; that the plaintiff was required to shove the bars into the bin as they were handed to him by others, while standing on a plank, used as a scaffold, 12 feet long, 12 inches wide and 2 inches thick, one end resting 6 feet above the ground and the other on a pile of iron 2 or 2½ feet high; that while in this position the plank in some way broke or fell, causing the injury complained of: *Held,* evidence sufficient upon the issue of defendant's actionable negligence in failing to provide the plaintiff a reasonably safe place to do the work required of him.

SMITH *v.* R. R.

APPEAL by defendant from *Webb, J.*, at September Term, 1915, of MECKLENBURG.

Civil action to recover damages for personal injuries caused by the alleged negligence of the defendant company.

On the ordinary issues, in demands of this character, as to negligence, contributory negligence and damages, there was verdict fof plaintiff. Judgment on the verdict and defendant appealed, assigning for error chiefly the refusal of the court to enter judgment of nonsuit.

E. R. Preston and Duckworth & Smith for plaintiff.

O. F. Mason, F. M. Shannonhouse and W. S. Beam for defendant.

HOKE, J. There was evidence on the part of the plaintiff tending to show that, on 19 August, 1913, plaintiff, with assistants, was en-
(185) gaged as employee of defendant in unloading some bar iron from a car at Spencer, N. C., and placing same in a rack constructed for the purpose, the rack containing eight bins, one above the other, and the topmost being ten feet above the ground; that plaintiff's part of the work was to shove the bars of iron into the bins as the same were handed to him by the other hands, and, in putting the iron into the upper bins, the seventh or eighth, he had to stand on a scaffold or platform, consisting of one plank twelve feet long, twelve inches wide and two inches thick, and, to give it sufficient height for the upper bins, one end was rested on one of the bins six feet from the ground and the other on a pile of iron, about two or two and a half feet high, lying across a walk; that the plank had become very slick on the surface from frequent use and the ends were worn and very much beveled, and as plaintiff was standing on this plank holding onto the rack with his left hand and shoving a piece of iron into an upper bin with his right, the plank "gave way" in some way, either slipped or turned or broke, causing plaintiff to fall to the ground, rendering him unconscious for a time and inflicting painful injuries; that there were bucks there, something like a carpenter's horse, by which plank could have been securely held, but these were not used, the foreman or boss giving as his reason that, in order to use the bucks, the pile of iron across the walk which was in the way would have had to be removed; that the platform was made or the plank placed by direction of defendant's foreman or boss, who was present throughout, had charge of the work and the hands engaged therein, and directed plaintiff to get on the plank and do the work in the manner he was doing it.

Upon these, the facts making in favor of plaintiff's claim, defendant, giving full adherence to the principle that an employer of labor, in the exercise of reasonable care, is required to provide for his employees a safe place to work and to furnish him with tools and appliances safe

and suitable for the work in which they are engaged, earnestly contends that this claim comes properly under a limitation upheld in several of our decisions, that this principle referred to does not usually prevail under "ordinary" conditions requiring no special care, preparation or prevision, where defects are readily observable, and when there was no good reason to suppose that any injury would result, and that, under a proper application of these decisions, the present occurrence should be considered an excusable accident. *Bunn v. R. R.*, 169 N. C., 648; *Simpson v. R. R.*, 154 N. C., 52; *House v. R. R.*, 156 N. C., 222; and *Brookshire v. Electric Co.*, 152 N. C., 669. But, in our opinion, defendant's position cannot be maintained, in view of the fact that the representative of the company, the foreman in charge and control, was present; that the platform was arranged and plaintiff put to work on it by his direction, and of the evidence tending to show that the plank prepared for the work was unfitted for its purpose and was insecurely placed. In this aspect, the claim comes rather under *Pearson v. Clay Co.*, (186) 162 N. C., 224; *Mincey v. R. R.*, 161 N. C., 467-471; *Reid v. Rees*, 155 N. C., 230; *Mercer v. R. R.*, 154 N. C., 399; *Cotton v. R. R.*, 149 N. C., 227; *Barkley v. Waste Co.*, 147 N. C., 585, and that class of cases in which the employer was fixed with responsibility by reason of having failed to provide for his employee a safe place in which to do his work.

There was no error in refusing to nonsuit plaintiff, and the judgment in his favor is affirmed.

No error.

Cited: Yarborough v. Geer, 171 N. C. 336, 337 (f); *Hickman v. Rutledge*, 173 N. C. 179 (f); *Hairston v. Cotton Mills*, 188 N. C. 559 (f); *Fowler v. Conduit Co.*, 192 N. C. 17, 18 (l).

J. W. CAMPBELL ET ALS. *v.* L. W. SHAW ET ALS.

(Filed 24 November, 1915.)

Deeds and Conveyances—Warranty—Breach of Part—Measure of Damages.

Where land is sold and conveyed and the title to a part thereof fails, in an action for breach of warranty and seizin the damage recoverable is the value of the proportionate part of the lot to which the title failed, based upon the consideration paid for the whole thereof; and the fact that the land was worth greatly in excess of the purchase price can have no bearing on this issue.

APPEAL by defendants from *Lane, J.*, at March Term, 1915, of MECKLENBURG.

Osborne, Cooke & Robinson for plaintiffs.
Brevard Nixon for defendants.

CLARK, C. J. This is an action for damages for breach of warranty and covenant of seizin. The purchase price paid for the whole lot, 198 feet by 56 feet, was $1,900. There was a failure of title and breach of covenant of seizin as to a part thereof, 38 feet in length by 56 feet in width. The contention of the defendant is that, inasmuch as the purchase price paid was $1,900 and that part of the lot as to which the title is uncontroverted is worth $2,650, therefore the plaintiff suffered no damages. This argument hardly requires consideration. It is true that in an action of damages for breach of warranty and of covenant of seizin as to the whole lot the measure of damages is the purchase price. It follows, therefore, that if there is a defect as to any part of the lot the measure of damages is that part of the purchase money which was paid for that part of the lot the title of which was defective. *West v. West,* 76 N. C., 46, 48.

Where there is a failure of title to a part of the land, or a partial breach of the covenant of seizin, the rule is thus stated: "The measure of damages for breach of warranty of title to land is the propor-
(187) tion that the value of the land to which title fails bears to the whole consideration paid. That is, the proportion of the value of the land as to which the title fails bears to the whole, estimated on the basis of the consideration paid." *Lemly v. Ellis,* 146 N. C., 221. If the vendee has procured a good title to remedy the defect his damages are the amount reasonably paid for buying the outstanding title, not exceeding the original *pro rata* of the purchase money for that part of the land. It would be error to take the basis of the present actual value of the land when there is evidence that the actual value exceeds the consideration. *Price v. Deal,* 90 N. C., 291; *Banks v. Glenn,* 68 N. C., 36; *Dickens v. Shepperd,* 7 N. C., 526.

The jury, in consideration of all the evidence, found that the value of the proportionate part of the lot as to which the title failed, on the basis of the $1,900 purchase money for the entire lot, was $450. This was based, not upon the proportion of the area, but upon the proportion in value of that part of the lot to which the title is defective to the entire purchase money. Though no witness fixed the exact amount of damages at $450, the jury had to draw their own inferences from all the evidence. We do not find it necessary to consider the other exceptions, which are based more or less upon the proposition already discussed.

No error.

Cited: Newbern v. Hinton, 190 N. C. 113 (f); *Bank v. Williams,* 209 N. C. 108 (f).

W. T. LITTLE ET ALS. v. J. W. EFIRD ET ALS.

(Filed 24 November, 1915.)

Equity—Injunction—Cloud on Title—Judgment Liens—Fraud.

A devise of lands for life, authorizing the life tenant to sell a portion thereof to pay debts due by the estate, and at the termination of the life estate the lands to be sold and the proceeds divided between W., the husband of the life tenant, and certain others specified, in certain proportions. There were affidavits tending to show that to pay debts against the estate it was necessary to sell the whole of the lands, which were purchased at the sale by the life tenant at an adequate price, the executor, W., and the heirs at law joining in the conveyance. A judgment creditor of W. issued execution and levied upon the lands, and was proceeding to sell the interest of W. when he and others interested instituted their action to have the sale under the levy restrained and the lien of the judgment removed as a cloud on the title; and the defendant sets up in this action that the transaction was a device to hinder, delay or defraud him in his rights: *Held*, equity will take jurisdiction in such instances of removing the cloud upon the title to lands, and the main relief sought being by injunction, and a material question being raised making for plaintiff's right and tending to establish it, the restraining order will be continued to the final hearing.

APPEAL by defendant from *Devin, J.*, at chambers in ALBEMARLE, on 14 May, 1914.

Civil action heard on motion by defendant to dissolve a tem- (188) porary restraining order.

The action was instituted by Sarah C. Little, having legal title and in possession of a tract of land, and W. I. Little, as executor of S. C. Little, and others to restrain defendant from having the land sold under a judgment and execution in his favor against said W. I. Little, one of plaintiffs, and thereby wrongfully casting a cloud upon the title of said Sarah Little, etc. On consideration of the facts in evidence, his Honor entered judgment continuing the restraining order to the hearing, and defendant excepted and appealed.

J. M. Brown & Son and R. L. Smith for plaintiff.

A. C. Honeycutt for defendant.

HOKE, J. On the hearing there were facts in evidence on part of plaintiffs tending to show that the land, the subject-matter of the litigation, was the property of S. C. Little, who died resident of Stanly County in November, 1908, leaving a last will and testament in which he devised the said property to his daughter, Sarah, *feme* plaintiff, for life, and that at the termination of the life estate said land be sold and

the proceeds in money arising therefrom be divided, plaintiff W. I. Little to have half the proceeds of sale and the other half to be divided among his other children and one grandchild.

By a codicil to said will the life tenant, Sarah C. Little, was authorized to sell the personal property to enable her to pay the debts of testator and, with advice and consent of W. I. Little, executor, she might sell as much as ten acres of land for like purpose; that the debts proving to be of greater amount than supposed, it was found necessary to sell all of the land of the testator to pay his debts, and the same was sold and conveyed to the life tenant at its full value of $300, the executor and heirs at law joining in the deed, and the money arising therefrom was all paid on the debts of the testator and the account and settlement of the estate was offered in evidence in support of plaintiff's position; that defendant, having docketed two judgments against W. I. Little, had caused execution to be issued and levied, and, at his instance, the land was advertised to be sold according to the exigency of said writs and would be, unless restrained, etc., thereby wrongfully casting a cloud on the title of Sarah C. Little, the true owner. There was evidence on part of defendant tending to show that he had two judgments, duly docketed, against W. I. Little, and husband and coplaintiff of Sarah C. Little; that by making the conveyance to his wife for the land he and the other heirs had thereby elected to hold the devise as realty, and that there was ample personal property, with the ten acres specifically allotted, to pay the debts and settle all the obligations of the estate, and the
(189) entire transaction was entered into and the conveyance in question made, not in good faith, but with a view and purpose of defrauding defendant of his just debt and claim and preventing its collection out of the estate.

Under several of our decisions on the subject and by the express provisions of the statute, the owner of land is entitled to the benefit of a suit of this kind and to restrain proceedings under a docketed judgment when it is made to appear that such course would wrongfully cast a cloud on the owner's title. *Smith v. Parker,* 131 N. C., 470; *Mortgage Co. v. Long,* 113 N. C., 123; Revisal 1905, sec. 1589. And when, as in this case, the main purpose of the action is to obtain a permanent injunction, it is held to be the correct rule: "That if the evidence raises a serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, the preliminary restraining order should be continued to the hearing." *Tise v. Whitaker,* 144 N. C., 510, citing *Hyart v. DeHart,* 140 N. C., 270; *Cobb v. Clegg,* 137 N. C., 153, etc., a position approved in several of the more recent cases on the subject. *Guano Co. v. Lumber Co.,* 168 N. C., 337; *Herndon v. R. R.,* 161 N. C., 650; *Stancil v. Joyner,* 159 N. C., 617.

Applying the principle, there is assuredly on the record serious question raised as to the right of defendant to proceed further by execution and sale of the property, and the judgment of his Honor, continuing the restraining order to the hearing, is approved.

Affirmed.

Cited: Cobb v. R. R., 172 N. C. 61 (f); *Smith v. Smith*, 173 N. C. 125 (f).

JOHN H. DELIGNY v. TATE FURNITURE COMPANY.

(Filed 17 November, 1915.)

1. Master and Servant—Employer—Pleadings—Defective Appliances—Approved and in General Use—Other Negligent Acts—Trials—Questions for Jury.

Where an employee of a furniture manufacturing company sues for damages, alleging that the defendant negligently failed to provide for the "belt sander" or polishing power-driven machine, at which he was required to work, an iron cleat, one edge of which was finished with teeth something like a saw, which was known, approved and in general use, and that instead thereof provided for the machine a thin strip of wood or timber, nailed to the top of the table of the machine, which was weak, flimsy and insufficient, and not adapted to the use to which it was being put, and that the boards to be dressed or polished by the plaintiff were warped and twisted, thereby increasing plaintiff's danger, and in consequence of this failure of defendant to perform his duty, etc., the injury complained of was caused: *Held*, the negligence alleged consisted not only in the failure of the master to furnish a devise known, approved and in general use, but that it negligently furnished an improper or defective device rendered more unsafe by the warped and twisted boards, and the lack of proof by the plaintiff that the device alleged was known, approved and in general use left the further question of defendant's negligence in furnishing the defective appliance and improper boards, when there was a conflict of evidence, to the determination of the (190) jury.

2. Pleadings—Amendments—Court's Discretion—Appeal and Error—Interpretation of Statutes.

An amendment to the complaint is necessary for the plaintiff, in an action to recover damages for the negligence of the defendant, when his evidence does not correspond with the facts alleged by him; and where a new cause of action is not alleged by the amendment, the court may allow it in its discretion upon such conditions as will protect the other party against being taken by surprise, or direct the facts to be found according to the evidence, if the variance is not material (Revisal, secs. 515, 516), or if the variance is material, and the adverse party has been

taken by surprise or misled, the court may allow the amendments upon such terms as may be just. Revisal, sec. 515.

3. Same—Supreme Court.

In proper instances the Supreme Court will allow an amendment to the complaint, for the furtherance of justice. Revisal, sec. 1545.

4. Master and Servant—Employer—Pleadings—Negligence—Allegations of Separate Acts—Appeal and Error.

Where, in an action to recover damages for an injury alleged to have been negligently inflicted by several acts of the defendant, each is sufficient in itself to sustain a verdict in plaintiff's favor, the elimination of one or more of them will not deprive the plaintiff of his judgment when one or more of the alleged causes of action have been legally and properly established.

5. Master and Servant—Contributory Negligence — Trials — Evidence—Questions for Jury.

Upon the question of whether a servant is guilty of contributory negligence in continuing to work at a power-driven machine in the face of an added danger due to the master's negligent failure to inspect the machine or correct the defect after he had been informed thereof, etc., it is competent for the jury to consider the relative positions of the parties, and the circumstances that the servant is dependent upon his wages for a living, etc.; and the right of action of the servant will not be barred either by the doctrine of assumption of risk or contributory negligence in continuing to work under the existing conditions, unless the danger was so obvious and threatening, or the chances of danger were so much greater than those of safety, that a man of ordinary prudence would not have continued to work there.

6. Same—Instructions—Construed as a Whole—Error in Part—Appeal and Error.

When contributory negligence and assumption of risk are relied on in an action to recover damages for personal injury, and the evidence is conflicting on the issues, the questions are for the determination of the jury under correct application of the principles of law to the facts by the charge of the court; and where the charge of the court, construed as a whole, is clearly and unmistakably and correctly expressed, so that the jury could not have been misled, fragments thereof, taken separately, though subject to criticism, will not be held reversible error.

7. Master and Servant—Negligence—Defective Appliance—Evidence of Former Defect.

Where the damages sought in an action to recover for a personal injury are alleged to have been caused by a defective machine furnished by a master to the servant at which the latter performed his services, and there is evidence thereof, it is competent for the plaintiff to testify that the machine had been working badly before then by reason of the defect alleged, especially when there is evidence that the plaintiff had theretofore reported the defect and the defendant had promised to correct it.

8. Trials—Improper Questions—Appeal and Error—Unanswered Questions —Impeachment—Procedure.

An improper question asked a witness on the trial of an action, for the purpose of impeaching his testimony, will not be considered on appeal unless it is in some way made properly to appear what the answer would have been, or that it was prejudicial to the appellant. In such instances the complaining party should immediately appeal to the trial judge for his intervention to correct the abuse, in his sound discretion, from which there is no appeal unless in very exceptional cases.

APPEAL by defendant from *Lyon, J.*, at February Term, 1915, of (191) GUILFORD.

Civil action. The plaintiff sued for damages for personal injury sustained while working in the factory of the defendant at High Point, N. C., on 19 May, 1914, when plaintiff suffered a fracture of both bones in his right forearm. He alleged that at the time of the injury he was engaged in operating a belt sander, and properly described it as consisting of a table or bed at each end of which was a pulley, around which ran a sand-belt, which is a belt with one side sanded for the purpose of polishing material. The course of the belt, in one direction, is over the top of the bed and lengthwise thereof, and on its return it moves under the table. The bed is movable both up and down, and back and forward across the line of the belt. The operation of the machine consists in placing the board or other material to be sanded on the bed, and then, after raising the bed to a proper height, pressing the sanded or underside of the belt down upon the material by means of a wooden weight in the shape of a flat-iron applied on the top of the belt. In order to cover the full surface of the material to be sanded the table is, during the operation, moved backwards and forwards across the line of the belt. The machine at which plaintiff was working had a wooden strip of about the thickness of the material under treatment nailed across the bed at right angles to the line of the belt, and near the end of the belt, toward which the belt tended to draw the material. This was placed there to resist the tendency of the belt to draw forward with it the material being sanded. In the side of this strip, and next to the material, were sharp iron points about an inch apart, protruding therefrom and parallel to the bed of the machine, thus forming a cleat, for the purpose of taking hold of the material when pushed against it and preventing it from rising above the cleat and being pulled forward in the direction of the belt. The pieces which the plaintiff was sanding at the time of his injury were quartered oak bed panels, 22 inches wide, about 4 feet long and a quarter of an inch thick. The plain- (192) tiff charges the defendant with negligence in two particulars:

First. In failing to "equip this machine or sander with the iron cleat of the character hereinbefore set out," which the plaintiff alleged was in known, approved, and general use; and,

Second. In furnishing to the plaintiff and requiring him to work upon the said machine panels, which were more or less warped and twisted and liable to escape from the fastenings.

The defendant admitted that the machine was not equipped with the iron cleat described, but denied that the said iron cleat was in known, approved, or general use, or that its use would be practicable on the machine in question, or that it would render said machine any safer, and alleged that the wooden cleat furnished served the same purpose as alleged in respect of the iron cleat, was just as safe, and was better adapted for sanders for thin material where the use of the iron cleat was not practicable. The defendant denied, according to its knowledge, having furnished to the plaintiff, for his use in operating the machine and doing his work, warped and twisted panels, and alleged that it was a part of plaintiff's duty to select from the panels furnished him *en masse* such as were warped or twisted and lay them aside to be sanded by hand. The defendant averred that if the plaintiff was injured because of a warped or twisted panel such injury was the result of his own negligence in attempting, contrary to instructions, to sand such panel on the machine, and pleaded assumption of risk and contributory negligence.

So far we have taken our statement substantially from the brief of defendant's counsel, which we think, from a careful examination of the record, is perfectly correct in the main, but as there is some disagreement between counsel of the respective parties as to what is the particular act of negligence charged against defendant and as to the true nature and construction of the "sander," we will make some extracts from the plaintiff's complaint, for he contends that he has alleged, as specific acts of negligence, apart from the absence of a metal cleat, that the wooden cleat was itself an improper and insufficient appliance for the safe and effective operation of the machine, and that this is especially so if the planks or boards being dressed are bent or warped. These are his allegations expressed almost in his own language:

1. The defendant, in operating its factory, used numerous and various kinds of machines and machinery, including a belt sanding machine, in its said factory at High Point, all of which were propelled by steam power, involving the use of shafting, pulleys, belts, and other appliances.

2. There is much danger attending the operation of many of said machines, including the sanding machine, which the plaintiff, on the occasion of his injury, hereinafter more fully set out, was operating, all

of which was known to the defendant at the time of the employ- (193) ment of this plaintiff and on the occasion of his injury.

3. Plaintiff, on 19 May, 1914, was, and for some time prior thereto had been, in the employ of the defendant, Tate Furniture Company, and on said date was engaged in the regular performance of his duties, in the operation of a sanding machine, which required him to sand or dress, by having the sand belt pass over and upon pieces of plank ordinarily known as "head-board" or "foot-board" panels for beds, they being about twenty-two (22) inches in width and four (4) feet in length, and one-fourth to one-half inch in thickness.

4. The sanding machine, if fully and properly equipped, consisted in part of two pulleys, one at either end of the machine, which are about six feet apart, and have under them the necessary supports, and over and around these pulleys passes a sand belt, or sanded belt, on horizontal lines, at approximately five hundred revolutions per minute. The belt is made of heavy canvas, smooth on one side, and sanded on the other side. Under the upper side of the belt, as it revolves around the pulleys, there is a table about six feet in length and eighteen or twenty inches in width, having a number of slats, with small or narrow spaces between them.

5. In sanding lumber or timber upon this machine it is necessary to lay the board upon the table, with the face to be dressed upwards and approximately within one inch of the sand belt. That in order to bring the belt and the timber in touch with each other, and to produce the necessary friction for dressing or sanding the board, the plaintiff was using on the occasion in question, as was usual and necessary and as required by defendant, a block weighing some eight pounds, which the plaintiff placed upon the top of the sand belt, and with his right hand and arm pressed the same down upon said belt, at the same time giving it a forward and backward movement, thus bringing the belt in contact with the timber for the full length thereof, and in this way the plank was sanded or dressed.

6. A sander, of the character just hereinbefore described, when complete, has an iron cleat across the table, with bolts passing through it and also through the slots or spaces between the strips of the table and fastening on the underside thereof, this being made stationary, subject, however, to be moved and adjusted to suit the length and character of the timber being dressed or sanded. One edge of the cleat or strip of iron fastened across the table is finished with teeth somewhat like a saw.

7. In operating the machine the plank is placed upon the table with one end against the cleat, and with such force as to imbed the teeth of the cleat into it, and thereby secure it so as to prevent it from being

drawn by force of the friction with the sand belt, while the latter is in motion over the pulleys.

(194) 8. The cleat, or piece of iron above described, is, and was at that time, a necessary part of the sander, and was then and theretofore known, approved, and in general use, though plaintiff was ignorant of the fact at that time, and does, in fact, make the operation of the machine safe to the operator; and no sander of the character described is complete or safe without the metal cleat.

9. The sanding machine of the defendant, which the plaintiff was operating at the time of his injury, had no such cleat or device, but was provided with a thin strip of wood, or timber, nailed to and upon the top of said table in such manner as that the same could be easily removed from time to time without injury to the table.

10. That on the occasion of the injury to the plaintiff, hereinafter more fully described, and in consequence of the absence and lack of said iron cleat constructed and provided as aforesaid, the plank upon which the plaintiff was engaged at work, by force and operation of the sand belt, was driven and hurled upon one of the pulleys of said machine and rebounded with great force, and in the rebound hit the pressing block, then in the plaintiff's hand, and thereby broke both bones in the plaintiff's forearm, whereby he was caused to suffer great pain for many days, and was permanently injured in his said right forearm; such injury having the effect to greatly impair the strength and usefulness of said arm and hand and disable the plaintiff from closing his right hand, all to his great damage.

11. The defendant knew that this machine was not, on the day of the injury, equipped with an iron cleat, as described, but only with a flimsy, weak, and insufficient piece of timber, not secure in character, and not adapted to the use to which it was being put, and that the risk to the plaintiff was increased by reason of the absence of an iron cleat of the character hereinbefore described.

12. The plaintiff was required by the defendant to work at this machine at a time when defendant knew that it was defective and was not equipped with an iron cleat of the character hereinbefore described.

13. On 19 May, 1914, plaintiff was performing his duty in the operation of said machine when defendant required the plaintiff to work upon and sand boards which were more or less warped and twisted, thereby increasing the plaintiff's risk of injury and damage, as the effect of such warping and twisting was to make said timber more difficult to confine to the table of the sander, and especially was it more difficult to do so by reason of the absence of the iron cleat as described, and of all this the defendant had knowledge.

14. It was a positive wrong and negligence on the part of defendant to furnish boards, or material, in any way warped and twisted and to require plaintiff to dress the same, especially on a sand machine so defective as hereinbefore described, all of which tended to and did, in fact, increase the risk and cause the injury and damage (195) herein described to the plaintiff.

15. The failure of defendant to equip the sander with the iron cleat and to furnish to and require the plaintiff to work upon and dress boards or panels warped and twisted on said machine or sander was negligence on the part of the defendant and a positive wrong to this plaintiff, which caused the injury to him.

The above allegations taken from the complaint are flatly denied by the defendant, in its answer, and the injury to the plaintiff is therein imputed to his own want of proper care in the selection of boards to be dressed or sanded, sound material having been provided for this purpose, with positive instructions to use it only. There was considerable evidence offered by the parties tending to sustain their respective contentions, but we need only refer to it in this manner without setting it out, as brief, but sufficient reference will be made to it in the opinion. There was no objection to the issues which the court submitted to the jury, and upon which they returned the following verdict:

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

2. Did the plaintiff voluntarily assume the risk and danger of being injured in the manner in which he was injured as an incident of his employment? Answer: No.

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,500.

Charles A. Armstrong, King & Kimball for plaintiff.

Brooks, Sapp & Williams and Peacock & Dalton for defendant.

WALKER, J., after stating the case: The general doctrines in the law of negligence have been well settled by the decisions of this Court, and the difficulty lies always in attempting to apply them to a given state of facts. We wish to say of the questions raised in this case, and *in limine*, that their correct solution depends largely upon a thorough understanding of the facts, and a close attention thereto, as the liability of defendant, as we view the pleadings and the evidence, is to be determined more upon how they have been found by the jury then upon the proper apprehension of the general legal principles involved, about which there seems

to be very little difference in opinion among the counsel. Before entering upon a consideration of the main questions presented by the exceptions, we would lay out of the case one matter, which is much discussed in the briefs, as to the failure of the defendant to use the metal cleat,

(196) which defendant asserts really is the only act of negligence charged against it, and which defendant also asserts it was not, under the evidence, required to use, as there was no legal proof that it had been approved and in general use, or that it was any safer or more efficient than the wooden cleat, and the evidence being that it was used only for thicker boards, so that, being made of metal and presenting a harder and more unresisting surface to the belt, it would not rub off the sand and injure it. We are of the opinion that this matter has been completely eliminated from the discussion by the following instruction of the court in its charge to the jury: "There is no evidence in this case sufficient to sustain a finding that the metal cleat referred to in the evidence was at the time of the injury complained of in known, approved, and general use on machines like the one complained of, and in arriving at your answer to the first issue, the court charges you that there was no duty upon the defendant to furnish such metal cleat on the machine complained of, and unless you find negligence under some other phase of the case it would be your duty to answer the first issue No." The question then recurs, whether there was any other act of negligence alleged against the defendant, and proof to sustain it, in respect of its duty to furnish its employee with a reasonably safe place, machines, appliances, tools and materials for the performance of his work, which, in this case, is practically a question of fact, if sufficient allegation thereof appears. It is not permissible to allege one act of negligence and prove another, without amendment, and not even then if it materially or substantially changes the cause of action so as to make it, in effect, a new one, for, in the latter case, it would amount to a failure of proof, and not merely to a variance (*Simpson v. Lumber Co.*, 133 N. C., 95), which occurs when, while the pleading and proof do not exactly correspond, the former may be made to do so by amendment in the discretion of the court, and upon such terms as may be just and upon such conditions as will protect the other party against being taken by suprise. Pell's Revisal, secs. 515, 516, and notes. Where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs (Revisal, sec. 516); or where the variance is shown by the party, and found by the court to be material, the opposite party having been misled thereby, with the further fact, as to the respect in which he has been so misled, the court may order the pleading to be amended, upon such terms as may be just. Revisal, sec. 515. But this case is like that of *Simpson v. Lumber*

Co., supra, which has been frequently approved by this Court, as recently as the Spring Term of last year, in *Steeley v. Lumber Co.,* 165 N. C., 27. The charge in that case was one for negligently burning the plaintiff's timber, and the particular act of negligence was the use of an engine having a defective spark-arrester, and the court allowed the complaint to be amended by adding the allegation that the right of way was foul, being covered with inflammable material, (197) which was held to be proper, because it only added a new act of negligence as contributing to the burning of the timber. We there said in regard to this question:

"It can make no difference with respect to the plaintiff's right to recover whether the burning was caused by a defective engine or by setting on fire combustible material carelessly left by the defendant on the right of way. Amendments which only amplify, or enlarge, the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged, or fortified, in varying forms, to meet the different aspects in which the pleader may anticipate its disclosure by the evidence. 1 Enc. Pl. and Pr., 557-562. In suits founded on negligence, allegations of fact tending to establish the same general acts of negligence may properly be added by amendment. 1 Enc. Pl. and Pr., 563; *R. R. v. Kitchin,* 83 Ga., 83. An amendment can be allowed under our law when it does not substantially change the claim or defense (Code, sec. 273), and the statement of the additional grounds of negligence is not a new cause of action or a substantial change of the plaintiff's claim. *Kuhns v. R. R.,* 76 Iowa, 60; *Davis v. Hill,* 43 N. H., 329; *R. R. v. Salmon,* 14 Kan., 512; *Smith v. Bogenschutz* (Ky.), 19 S. W., 667; *Nash v. Adams,* 24 Conn., 33; *Carmichael v. Dollan,* 25 Neb., 335; *R. R. v. Hendrix,* 41 Ind., 49; *Chapman v. Nobleboro,* 76 Me., 427. The amendments allowed in the cases just cited were not unlike the one which was made in this case. In *Smith v. Bogenschutz, supra,* it was held that a complaint which alleged that a certain injury caused by the overflow of molten iron from a ladle in which it was being carried was due to the jostling of the carriers in a narrow passway could be amended so as to allege that the overflow was due to a defect in the ladle, without introducing any different cause of action. We do not see how our case can be distinguished from *Smith v. Bogenschutz,* which was well considered."

In the *Simpson case* the real cause of action was the burning of the timber—that was the gravamen of the action, and it differed not how it was brought about—whether by a defective smokestack or a foul right of way, and the two cases are perfectly analogous, for here the gist of the action is the negligent injury to the plaintiff while the

manner of causing it is immaterial, subject, however, to the qualification above stated. We have referred to these matters, as it has been urgently argued that the plaintiff is without any cause of action because he has failed to establish by any admissible proof the single act of negligence upon which he rests his right to damages. If the decision of the case depended upon this one objection, we would not hesitate to allow an amendment of the complaint, corresponding with the
(198) proof and the finding of the jury, in this Court, as we are empowered to do. We quote literally the section of the statute relating to this question, and call the special attention of the profession to its liberal and sweeping provisions:

"The Supreme Court shall have power to amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment. Also to amend by making proper parties to any case where the Court may deem it necessary and proper for the purposes of justice, and on such terms as the Court may prescribe. And also, whenever it shall appear necessary for the purpose of justice, to allow and direct the taking of further testimony in any case which may be pending in said Court, under such rules as may be prescribed, or the Court may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below." Pell's Revisal, sec. 1545, and notes.

The predominant idea of the present code system is to try the cases on their real merits. It is broad in its scope and amply sufficient, as it now is, to administer justice, in every possible case, without regard to form or technical accuracy, and is sufficient, as it is at present, and even without any amendment, to satisfy the most advanced notions of modern pleadings and procedure. But we think that the judge has, by the instruction we have quoted, neutralized, if not entirely cut out, all of the defendant's objections which are based upon its supposed duty to use the metal cleat, and the case need only be further considered upon the other exceptions.

This brings us to the principal exception, whether defendant was guilty of negligence in any other respect, alleged in the complaint. That the plaintiff has alleged other acts of negligence, we entertain no doubt, as it is stated, in the fourteenth section of the complaint, that the defendant did not use the iron cleat, but that, instead, the machine was equipped *only* with a flimsy, weak and insufficient piece of timber, not secure in character, and not adapted to the purpose for which it was being used, and that it increased the ordinary risks in operating the machine. What does all this mean, even if strictly and literally interpreted, but that the defendant has been negligent in another respect

than that of failing to use a metal cleat, in that it required plaintiff to use a wooden cleat, which was, of itself, inadequate, even when in its own perfection, and regardless of the omission to use the metal appliance? And the complaint further alleges that, in addition to this second act of negligence, the defendant furnished boards to be dressed by the plaintiff which were bowed and warped, and that this was a contributing cause of the injury. It can make no difference, in passing upon defendant's liability, whether one or all of the acts of negligence in combination caused the injury, provided any one of them was (199) sufficient for the purpose, as we held in *Knott v. R. R.*, 142 N. C., 238. We must be pardoned for quoting quite liberally from the opinion in that case, because it is so apposite, in answer to most of defendant's contentions in this appeal:

"It does not appear to us, after a careful reading of the complaint and giving it that liberal construction with a view to substantial justice between the parties which is required by the law (Revisal, sec. 495), that the plaintiff has thus restricted himself to proof only of the defect in the spark-arrester and the bad condition of the right of way. It is true, he alleges that the spark-arrester was defective, but in the seventh section of the complaint he states generally that the fire was caused by a spark emitted from the engine, which ignited the combustible material on the right of way and thence spread to his standing timber, which was destroyed. But can it make any difference, in the legal aspect of the case, whether the spark or live coal came from the smokestack or the fire-box, even assuming them to have been in the best condition, if eventually it fell upon the foul right of way and produced the conflagration? We think not, because the permitting its right of way to remain in a dangerous condition was an act of negligence, sufficient of itself to cause the damage and necessarily proximate to it, if the fire immediately, and without any intervening efficient and independent cause, spread to the plaintiff's woods. *Aycock v. R. R.*, 89 N. C., 321; *Phillips v. R. R.*, 138 N. C., 12; *R. R. v. Kellogg*, 94 U. S., 469. If one does an act lawful with respect to the complaining party, and does it in a proper way, the ensuing loss, if there is any, is not, in the legal sense, an injury, but *damnum absque injuria*. If the act is unlawful, or is done negligently, or, in other words, if in doing it he fails to exercise the foresight of a man of ordinary prudence and by reason thereof does not see that some damage will follow, when otherwise he would have discovered it, the wrongdoer is liable for the damage which proximately results. *Drum v. Miller*, 135 N. C., 204; *Jones v. R. R., ante*, 207, and *Hudson v. R. R., ante*, 204. The quality or particular character of the act of negligence is immaterial, so that it is sufficient to produce the injury. The judge, after reciting substantially

the allegation of the complaint, charged the jury in this case that before they could bring in a verdict for the plaintiff they must find that the defendant committed the very acts of negligence so set forth by him, that is, that the spark-arrester was defective and the right of way foul, and that by reason of the defect in the spark-arrester a spark was emitted from the engine and fell on the right of way, where it ignited the inflammable material there lying and caused the destruction of the plaintiff's property. So that the jury must have found that the spark-arrester was defective and the right of way foul, as they (200) gave the plaintiff their verdict. By the charge the testimony as to the fire-box and ash-pan was virtually taken from the jury. There were two acts of carelessness specified by the plaintiff in one part of his complaint, namely, having a defective spark-arrester and keeping a foul right of way; but when he came to allege, in another part, the negligence that caused the injury, he departed from this specific allegation and charged generally that the spark fell from the engine, without describing the particular place from which it was emitted, and that by reason thereof the fire was started on the right of way. In no view of the matter is it material to inquire how it happened to fall from the engine, so that it lighted on the right of way, which was in bad condition, and caused the fire. *Simpson v. R. R.*, 133 N. C., 95; *Troxler v. R. R.*, 74 N. C., 377; *Wise v. R. R.*, 85 Mo., 178."

It must be conceded that it was within the sound, discretionary right of the jury, upon the evidence submitted by the parties, to find that this injury was caused either by a defective cleat or by the warped or bent condition of the boards, and even if there be evidence that the plaintiff had the opportunity to choose among the boards those which were not thus defective, there was also proof that he was guilty of no negligence in this respect, but did the best that he could under the circumstances. We must not bind him to infallibility of judgment, for otherwise the defendant might, itself, fall under the same condemnation. These men, who work at complicated and dangerous machines, when their living depends so much upon their steady and uncomplaining devotion to the daily task assigned to them by their employers, must not be judged by the same unbending and inexorable rules which should apply to those who, being more fortunate and better circumstanced, may come and go at their will and pleasure. They are entitled to fair consideration and treatment proportioned to their ability and opportunity to serve their master faithfully without, at the same time, subjecting themselves to the peril of losing their jobs. Whether the master has been negligent toward his servant, or the latter has carefully or negligently performed his allotted task, depends much upon the situation and surroundings of the parties at the time of the injury; because,

before we can determine whether a person has exercised ordinary care, we must first know what the particular circumstances were under which the act alleged to be negligent was performed. The jury must place themselves in his place and consider his surroundings in order to judge him correctly, whether he be master or servant, and so is the law. The doctrine of negligence may be well crystallized and expressed in the words of the golden and unselfish rule, "Whatsoever ye would that men should do to you, do ye even so to them."

We have decided to this effect in numerous cases, and, among the first, is *Marks v. Cotton Mills,* 135 N. C., 287. This case has been prominently cited as settling this principle, and, recently, in (201) *Lynch v. R. R.,* 164 N. C., 249; *Lloyd v. R. R.,* 166 N. C., 24, 32. Referring to what was decided in *Marks v. Cotton Mills, supra,* we held in the case last above cited, quoting literally the language of that case: "It was the duty of this company to exercise ordinary care in providing a reasonably safe place for him (the employee) to work and reasonably safe tools and appliances with which to perform his task. *Marks v. Cotton Mills,* 135 N. C., 287, where we said: 'The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. . . . The rule which calls for the care of the prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not unfair to his employer, and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service it is the misfortune of the employee, and he must bear the loss, it being *damnum absque injuria;* but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employees. To the extent that he fails in this plain duty he must answer in damages to his employee for any injuries the latter may sustain which are proximately caused by his negligence.' Our latest expression on the subject is in *Lynch v. R. R.,* 164 N. C., 249: 'We have said in numerous decisions that the master owes

the duty to his servant, which he cannot safely neglect, to furnish him with proper tools and appliances for the performance of his work, and he does not meet fully the requirement of the law in the selection of them unless he uses the degree of care which a person of ordinary prudence would exercise, having regard for his own safety, if he were supplying them for his own use. *Marks v. Cotton Mills,* 135 N. C., 287; *Avery v. Lumber Co.,* 146 N. C., 595; *Mercer v. R. R.,* 154 N. C., 399. The master should, in the exercise of such care, provide reasonably safe tools, appliances and surroundings for his servant while doing the work.

(202) *Dorsett v. Mfg. Co.,* 131 N. C., 254; *Witsell v. R. R.,* 120 N. C., 557; *Orr v. Telegraph Co.,* 132 N. C., 691.' And to these citations may be added, *Pigford v. R. R.,* 160 N. C., 93; *Mincey v. R. R.,* 161 N. C., 467; *Kiger v. Scales Co.,* 162 N. C., 133. In the *Mincey case* we said: 'The duty of the master to provide reasonably safe tools, machinery and place to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety; and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert,* 116 U. S., 642; *Gardner v. R. R.,* 150 U. S., 349; *R. R. v. Baugh,* 149 U. S., 368; *Steamship Co. v. Merchant,* 133 U. S., 375. This undertaking on the part of the master is implied from the contract of hiring (*Hough v. R. R.,* 100 U. S., 213), and if he fails in the duty of precaution and care he is responsible for an injury caused by a defect which is known to him and is unknown to the servant. *R. R. v. McDade,* 135 N. C., 554."

This covers the entire ground of negligence as presented in this case, so far as the defendant is concerned, and defines its legal duty, and what will constitute a breach of it, with sufficient accuracy. It is also the plain duty of the master to use all machinery, appliances, tools and materials as have been approved and are generally used by those engaged in the same trade or business, which will contribute to the employee's safety, and this rule applies to all reasonable safeguards against injury to his servant. *Witsell v. Railroad Co.,* 120 N. C., 557, 562; *Lloyd v. Hanes,* 126 N. C., 359, 364; *West v. Tanning Co.,* 154 N. C., 47; *Walker v. Mfg. Co.,* 157 N. C., 131, 134; and as a part of this duty of the master in the operation of mills and other plants, where their machinery is more or less complicated, he must use such machinery and implements as are known, approved by the trade and in general use

(*Kiger v. Scales Co.*, 162 N. C., 133, 136), but he will not be discharged from liability, if he is otherwise negligent or fails in his duty, even though he may have used those things in his business which are known to have been approved and are in general use. There is also devolved upon the master the duty to inspect in a reasonable and careful manner the machinery and appliances in his plant, for the purpose of discovering any defects likely to injure those in his service. Labatt M. and S., secs. 154, 157; Bailey's Pers. Inj., sec. 2638; *Leak v. R. R.*, 124 N. C., 455; *Womble v. Grocery Co.*, 135 N. C., 474; *Cotton v. R. R.*, 149 N. C., 227. The question at last is, whether the master has failed, in any of the respects showing negligence, to discharge his duty to his servant. *Avery v. Lumber Co.*, 146 N. C., 592; *Barkley v. Waste Co.*, 147 N. C., 585, and also *Hudson v. R. R.*, 104 N. C., 491; *Shaw v. Mfg. Co.*, 143 N. C., 131; *R. R. v. Barrett*, 166 U. S., 617. (203)

The charge to the jury in this case was unusually clear and comprehensive. It defined with fullness and accuracy the law of negligence and proximate cause, as specially applicable to the facts, in the different phases of them, and as the jury might find them to be. There was nothing omitted, nor overstated, but every possible view of the case was presented with such force and clearness as to leave not the slightest doubt that the jury understood the law. We do not know what the judge could have said that he did not say with perfect correctness in thought and expression, and with absolute fairness and impartiality to both sides. It fully deserves the encomium passed upon a similar charge in *Young v. Fiber Co.*, 159 N. C., 375, 382, as being appropriate in every respect.

The Court was right in declining to give the peremptory instructions requested by defendant as to assumption of risk and contributory negligence, as the evidence was conflicting, and different inferences could have been drawn therefrom. The defendant assumed, of course, all the ordinary risks of the service, according to the original common-law rule, but not those which were caused or added by the master's own negligence, unless they were so obvious and threatening that a man of ordinary prudence would not have continued to work in the presence of them when the chances of danger were greater than those of safety. *Lloyd v. Hanes*, 126 N. C., 359; *Pressly v. Yarn Mills*, 138 N. C., 410; *Hicks v. Mfg. Co.*, 138 N. C., 319, 327; *Pigford v. R. R.*, 160 N. C., 93; *Britt v. R. R.*, 144 N. C., 256; *Bissell v. Lumber Co.*, 152 N. C., 125; *Pritchett v. R. R.*, 157 N. C., 88; *Lynch v. R. R.*, 164 N. C., 249.

The charge of the court must be construed as an entirety. We have said that "the apellant is not permitted to select detached portions

of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with the other portions thereof, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it. This rule is so plainly fair and just, both to the judge and the parties, as to have commended itself to the courts, and it is the only reasonable one to adopt. *S. v. Exum,* 138 N. C., 599; *S. v. Lewis,* 154 N. C., 632." This statement of the rule is inadvertently said in the plaintiff's brief to be taken from *Ramsay v. R. R.,* 91 N. C., 418, as quoted in *Brazille v. Barytes Co.,* 157 N. C., 454, 460; but it is not in 91 N. C., 418, but in *Kornegay v. R. R.,* 154 N. C., 389, at pp. 392, 393. When the charge is viewed, as it should be, not textually but contextually, it presents every phase of the case
(204) to the jury in clear and forceful language and utterly precludes the chance of any misunderstanding by the jury. The pleas of assumption of risk and contributory negligence did not rest upon such admitted or undisputed facts, as to present simply matters of law, but upon conflicting proofs and were therefore properly submitted to the jury to settle the contradictions. *Steeley v. Lumber Co.,* 165 N. C., 27. The charge, both upon negligence and those defenses, was as favorable to the defendant as they could have been, without trenching upon the fixed principles of law applicable thereto. Besides, the court gave all of the instructions requested by defendant to which it was entitled.

As to the questions of evidence, we have already practically disposed of those relating to the iron cleat. They have been banned by the charge of the court already quoted. It was competent for plaintiff to show by his own testimony that this machine had performed badly before, as evidence of its defectiveness, *Dorsett v. Mfg. Co.,* 131 N. C., 254; *Pritchett v. R. R.,* 157 N. C., 100; *McCarragher v. Rogers,* 24 N. E. (N. Y.), 330; 4 Labatt M. and S., sec. 1587, p. 4828; 1 Sh. and Redf. on Neg., sec. 60b; *Harrell v. R. R.,* 110 N. C., 215; *Leathers v. Tobacco Co.,* 144 N. C., 339; *Houston B. Co. v. Deal,* 33 So. Rep., 373, and especially in connection with the other testimony of plaintiff, that he had reported it to the company and a promise had been given to repair it.

A question was put to the witness W. L. Hepler, "You immediately notified the insurance company of this accident?" But there was no answer by the witness, and the inquiry stopped when the objection of defendant was made. The question was asked, we presume, to impeach the credibility of the witness, who had just testified in a way that directly conflicted with the evidence offered by the plaintiff. Under the circumstances we cannot see that it did any harm (*Featherstone v. Cotton Mills,* 159 N. C., 429), and especially as defendant seems to have

taken the same view of it, for there was no request that the court instruct the jury in regard to it, in order to prevent it having any prejudicial influence. This is not like the case of *Starr v. Oil Co.*, 165 N. C., 587, but more like *Featherstone v. Cotton Mills, supra,* and the other cases which are cited, reviewed and distinguished in *Starr v. Oil Co., supra.* Whenever such questions are asked, if they are irrelevant to the controversy and have a tendency only to prejudice one side or the other, the presiding judge should act promptly in preventing any such result and take drastic measures to do so, if necessary. When either of the parties resorts to such questions to gain an unfair advantage it is done at the sacrifice of the verdict, if he succeeds in securing one, on account of the very dangerous character of the question. But the subject is fully discussed in the cases above cited and needs no further elaboration. In this case, we see no reason for such a course. But for the objection the witness might have said that (205) defendant had no indemnity insurance. The defendant, if it felt aggrieved by the question, should have prayed for the intervention of the court, and relief, we are sure, would have been speedily granted by the learned presiding judge. Parties should act promptly in the assertion of their rights. This being merely an appellate tribunal, with jurisdiction merely for the correction of errors in law, cannot afford the relief which can be given only by the court below in its sound discretion, unless in very exceptional cases, of which this is not one.

We have given a thorough examination to the record and briefs of counsel and find no error in the trial of the case.

No error.

Cited: Gadsden v. Crafts, 175 N. C., 361 (2g); *Hassell v. Daniels,* 176 N. C. 101 (1f); *Holt v. Mfg. Co.*, 177 N. C. 174 (8g); *Elliott v. Furnace Co.*, 179 N. C. 145 (1f); *Capps v. R. R.*, 183 N. C. 187 (2b); *Medford v. Spinning Co.*, 188 N. C. 128 (5b); *Shaw v. Handle Co.*, 188 N. C. 238 (1f); *Crisp v. Thread Mills,* 189 N. C. 92 (5f); *Milling Co. v. Highway Com.*, 190 N. C. 697 (6f); *Fulcher v. Lumber Co.*, 191 N. C. 410 (8g); *Holeman v. Shipbuilding Co.*, 192 N. C. 240 (5f); *O'Brien v. Parks Cramer Co.*, 196 N. C. 366 (1g); *Grubbs v. Lewis,* 196 N. C. 393 (1f); *West v. Mining Corp.*, 189 N. C. 154 (1f); *Cody v. Hovey,* 217 N. C. 413 (2p, l).

T. W. MEWBORN & CO. v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE SOUTHERN RAILWAY COMPANY, AND THE NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 1 December, 1915.)

1. Interstate Commerce—Live-stock Bill of Lading—Carriers—Connecting Lines — Intermediate Lines — Damages — Evidence—Presumptions—Trials—Questions for Jury.

Interstate Commerce Act, and other recent amendments placing the entire regulation of interstate commerce under Federal control, and making the initial carrier liable for damages to a shipment of goods, does not relieve the intermediate or the delivering carrier of responsibility for its own negligence in damaging a shipment, or affect the decision of our State court in requiring them to show which of the carriers, in a connecting line of carriage, is responsible when the goods are shown to have been received in good condition by the initial carrier and delivered at destination in bad condition by the final one, such information being peculiarly in the knowledge of the carriers, and otherwise depriving the injured party of his right to have the issue passed upon by the jury.

2. Interstate Commerce—Amendments—Jurisdiction—State Courts.

The proviso in the Carmack amendment to the Interstate Commerce Law preserving to the interstate shipper any remedy or right of action he may have under existing law, has reference by interpretation to such rights and remedies as he may have under the law as it is recognized and enforced in the Federal courts, and may be adjudicated in the courts of the State having jurisdiction.

3. Interstate Commerce—Live-stock Bill of Lading—Stipulations—Damages—Written Notice—Waiver—Federal Decisions.

The stipulation in a livestock bill of lading requiring that notice in writing be given the carrier's agent at destination, of claim for damages to the animals shipped, before they are removed or mingled with other animals, may be waived by the carrier's agent at the delivering point; and our decisions to this effect, in the absence of controlling decisions of the Federal courts to the contrary, are reaffirmed under the facts and circumstances of this case, it appearing that the fact that the animals were badly and fatally injured was called to the attention of the final carrier's agent, and consignee requested by him to take the stock to his own barn where they could better be examined, without evidence that they were mingled with other animals.

4. Same—Discrimination.

The principle of waiver by the agent of the stipulation in a live-stock bill of lading that written notice of claim for damages to the animals shipped be given him at destination, before the animals are removed from the carrier's possession or mingled with other animals, etc., as recognized and upheld by the decisions of our State courts, is not in contravention of the Federal laws prohibiting a preference being given among the users of common carriers. *Baldwin v. R. R., ante*, 12, cited and applied.

APPEAL by plaintiffs from *Peebles, J.*, at March Term, 1915, of (206) LENOIR.

Civil action. The action was to recover damages to live-stock, alleged to have been negligently injured in shipment over defendant roads, in March, 1912. Defendants denied liability. The evidence having been submitted, on motion, there was judgment of nonsuit as to each and all of defendants, and plaintiffs excepted and appealed.

G. G. Moore for plaintiffs.

Rouse & Land for defendants.

HOKE, J. There were facts in evidence tending to show that, on or about 8 March, 1912, plaintiffs, under a live-stock contract, shipped a lot of horses and mules from Flemingsburg, Ky., to Kinston, N. C., passing over the Cincinnati and Flemingsburg Railroad, the initial carrier, to Johnston, Ky.; thence over the Louisville and Nashville Railroad to Knoxville, Tenn.; thence over the Southern Railway to Goldsboro, N. C.; thence over the Norfolk Southern to Kinston, N. C., where, on 12 March, they were delivered to plaintiffs in very bad condition; two of them so injured that one of them died that night and one the next day, and another, worth $160, had his eye hurt so that he went blind and was sold for $15, his value on the Kinston market, and fifteen others in bad physical condition, etc.; that the condition of the stock was called to the attention of the railroad agent of the Norfolk Southern, at Kinston, N. C., as they were being unloaded, and he requested plaintiffs to take them over to plaintiffs' own barn and he would then come over, where they could be more thoroughly examined.

There was testimony tending to show that the stock was in good order and condition when shipped at Flemingsburg, Ky., and also that they continued so until delivered to the Louisville and Nashville Railroad, at Johnston, Ky., and the contract of shipment was also offered in evidence, containing a provision as follows: "As a condition precedent to the shipper's right to recover any damage for loss or injury to said animals, he will give notice in writing of his claim thereof to the (207) agent of the railroad company or other carrier from whom he receives said animals before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same, to the said shipper, and before said animals are mingled with other animals," etc., and it was shown, further, that the claim for said wrong and injury was not made by plaintiffs until 2 April, 1912, and after the stock had been removed from the terminal station.

On these, the facts chiefly relevant to the issue, it is urged for appellees, as we understand the argument, that the judgment of nonsuit

should be sustained, by reason of certain of the more recent amendments to the Interstate Commerce Act, and notably the statute known as the Carmack amendment, 29 June, 1906, 34 Statutes, 595, which, as construed by well considered decisions of the Supreme Court of the United States, has placed the entire subject of interstate shipments under Federal control and has superseded all State policies and regulations in conflict with these provisions, and, as a consequence, the principle heretofore prevailing in this State, that on proof of delivery of livestock or other goods to an initial carrier, in a continuous line of shipment in good condition, and a delivery by a final carrier in a damaged condition, importing negligence, a *prima facie* case was made against the carrier sued, permitting the shipper to go to the jury on the question of such carrier's liability, may no longer be recognized or enforced; and this being true, there was no evidence offered to sustain the present demand.

A perusal of the cases cited, *R. R. v. Fur. Co.*, 237 U. S., 597; *Express Co. v. Cloninger*, 226 U. S., 491; *R. R. v. Riverside Mills*, 219 U. S., 186, and others of like import, seem to be in full support of the premise of this position; but, to our minds, it does not at all follow that the rule heretofore prevailing in this State in reference to the proper trial of causes of this character has been abrogated. A consideration of our decisions on this subject will show that it is a rule of proof, valid, on the principle very generally recognized here and elsewhere, that, in a judicial trial, when facts relevant to an issue lie peculiarly within the knowledge of one of the litigants, such litigant has the burden of showing them forth in evidence; a principle very insistent where otherwise the other party would be practically deprived of testimony on the issue that he is justly entitled to have. This rule of evidence was applied with us, as to the initial carrier, in *Meredith's case*, 137 N. C., 478-484, where *Connor, J.*, speaking to the subject, cites authority as follows:

"The principle is stated by *Mr. Justice Brown* in *U. S. v. R. R.*, 191 U. S., 84, thus: 'When a negative is averred in the pleading or the plaintiff's case depends on the establishment of a negative, and the
(208) means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party who is in possession of the proof should be required to adduce it; but upon his failure to do so we must presume it did not exist, which of itself establishes a negative.' He further says: 'This burden, however, which was simply to

meet the *prima facie* case of the Government, must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff.' The exact question was considered by the Supreme Court of Vermont in *Brintnall v. R. R.*, 32 Vt., 665, *Poland, J.*, saying: 'The argument is that, showing the box did not arrive at Boston, the end of the route, but was lost, does not prove or tend to prove the defendants did not deliver it to the next carrier, because it might have been lost between Castleton and Boston. It must be admitted that it is very inconclusive proof of the fact, but still we think it has some tendency to establish it. The box is proved to be in the hands of the defendants; there is no evidence that anybody else ever had it, or that it was ever in the possession of any other carrier in the line. The usual and ordinary course of things, what is always expected and what generally proves true, is that goods forwarded upon such a line arrived at their destination, and therefore the fact that goods do not arrive at one end of the line is some evidence they were not sent from the other. . . . But we place it upon the ground mainly that this was really all the proof the nature of the case permitted to the plaintiff, and that proof of a delivery by the defendants to the next road was a matter that was peculiarly within the power of the defendant, and not at all in the power of the plaintiff, unless the defendant and the connecting roads preserved evidence of the transfers of all freight from one road to another. . . . And on proof that any carrier on the route received the goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, it being peculiarly and almost solely within its power to make such proof." 3 Wood on Railroads, 1926; *R. R. v. Tupelo Co.*, 67 Miss., 35; *R. R. v. Emrich*, 24 Ill. App., 245. And, as to the final carrier, in whose possession the goods were found in a damaged condition importing negligence, in *Mitchell v. R. R.*, 124 N. C., 236, cases that have been several times since recognized as authorities; *Brinson v. R. R.*, 169 N. C., 425; *Lyon v. R. R.*, 165 N. C., 143; *Harper v. Express Co.*, 144 N. C., 639. The same principle is upheld in well considered cases in other State jurisdictions, *R. R. v. Slattery*, 76 Neb., 721, and *R. R. v. Williams*, 55 L. R. A., 289; and a like position for the trial of causes obtains also in the Federal courts. (209) *R. R. v. Wallace*, 223 U. S., 481; *Brinson v. R. R., supra*, 86 S. E., 371-374. In *R. R. v. Wallace, supra, Associate Justice Lamar*, delivering the opinion, said: "Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or

by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof."

And, in our opinion, there is nothing in the Federal legislation that interferes with this principle of evidence as a rule of proof. It is true that in the decisions of our highest court, dealing with the Carmack and other amendments, it is held "that the initial carrier is made responsible for any loss, damage or injury to the goods carried by it, by any common carrier, railroad or transportation company, not as absolute insurers, but to be fixed and determined according to the principles of general law applicable to common carriers and as modified by statute relevant to the subject," *Brinson v. R. R.*, citing *Express Co. v. Cloninger,* and that the opinion of *Mr. Justice Lamar,* just cited, is dealing with a case against the initial carrier. It is true also that these cases hold that the proviso in the Carmack amendment preserving to the interstate shipper any remedy or right of action he may have under existing law has reference by interpretation to such rights and remedies as he may have under the law as it is recognized and enforced in the Federal courts (*Express Co. v. Clonginger, supra*), but it is also held that the shipper's right of action, accruing to him under that law, may be enforced in the State courts having jurisdiction. *R. R. v. Wallace, supra.* Although by the amendment the initial carrier has been made responsible for the negligent default of each and all the connecting carriers in an interstate shipment, there is nothing in this provision which should prevent liability from attaching to the intermediate or final carrier against whom such default could be established by proper evidence. This has been directly held in several well considered cases. *Treadwell v. R. R.*, 150 Wis., 259; *St. L. Coast R. Co.*, 13 Ga. App., 102, 78 S. E., 1019, and other cases cited in note to *R. R. v. Alexander,* 227 U. S., 218; 36 Anno Cases, 83. And as a rule of proof, just in itself and recognized as a general principle of the law of
(210) evidence, we think that the principle referred to in the trial of that cause should still prevail. In the recent case of *R. R. v. Furniture Co., supra,* a decision much relied on by defendant, there is decided intimation in the opinion of *Associate Justice Holmes* that the principle, as a rule of proof, presents no interference with the Carmack or other amendments, and the State statute in that case was set aside because it imposed a penalty and, as a matter of substantial right, fixed the carrier sued with liability if it should fail within forty days to

inform the claimant, in the exercise of due diligence, when and where and by which carrier the goods had been damaged.

It is further contended that the nonsuit is proper because of the admitted fact that the stock was removed to the stables of plaintiffs before written notice of the claim was presented and in violation of section 11 of the contract. This provision has been recognized as a valid stipulation with us (*Duvall v. R. R.*, 167 N. C., 24, 25, citing *Austin v. R. R.*, 151 N. C., 137; *Selby v. R. R.*, 113 N. C., 594), and it has been also repeatedly held that the stipulation may be waived by the company and will be considered waived if the company or its agents in charge had knowledge of the damage and injury to the stock at the time the same were unloaded at the point of destination. *Kime v. R. R.*, 156 N. C., 451; *s.c.*, 153 N. C., 398; *Jones v. R. R.*, 148 N. C., 581.

In the present case there was testimony not only that the railroad agent at Kinston had knowledge of the claim and of the injury to the stock, but that he requested plaintiffs to take them from the company's receiving pen over to plaintiffs' stables, where he could come over and make a more careful examination. It is insisted, however, that this principle of waiver should no longer prevail, as to allow it would have the effect of granting a preference in favor of plaintiffs contrary to the Interstate Commerce Act and amendments thereto.

In these statutes conferring upon a commission the power to make reasonable and necessary regulations as to interstate shipments, it was no doubt the primary purpose to prevent undue preferences and discriminations among shippers; but there is, in our opinion, nothing in the principle objected to here that in any way militates against this salutary purpose. The stipulation, inserted to protect the carrier from improper or unconscionable claims, under circumstances where he would have no means of rebutting proof available, has no natural or necessary connection with or influence upon the rates charged, nor does the principle of waiver, as applied in this State, have any tendency to create a preference. There have been, as yet, no authoritative decisions to that effect, and, as now advised, we are of opinion that the principle as it has obtained here applies and should control in the present case. We have already so held in a case at the present term, *Baldwin v. R. R.*, *ante*, 12, in which *Associate Justice Allen*, delivering the opinion, said: (211)

"The rule permitting knowledge to supply the place of written notice is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others. It is a mode of proof applicable alike to all railroads and in favor of all shippers, and it is enforced against a carrier who has had possession of the property

with every opportunity to know the extent of the injury and its cause."

In the present case, as stated, the agent at the terminal station not only had his attention called to the condition of the stock at the time they were first unloaded, but requested plaintiff to take them to his stables, where they could be examined with more care. There is nothing tending to show that the stock had been mingled with other stock before this examination was made, and, on proof tending to show that this shipment passed en route into the control of the defendant, the Louisville and Nashville Railroad Company, when in good condition, and was turned over at the point of destination by the Norfolk and Southern in a damaged condition and injured to such a degree that two of them died and one went blind and was sold at a nominal sum, we are of opinion that plaintiff was entitled to have his claim submitted to the jury on the issue as to defendants' liability.

There is error in the judgment of nonsuit, and the same will be set aside.

Reversed.

Cited: Aydlett v. R. R., 172 N. C. 50 (1f); *Reynolds v. Express Co.*, 172 N. C. 494 (3f); *Bryan v. R. R.*, 174 N. C. 177 (1o); *Taft v. R. R.*, 174 N. C. 212 (3po); *Morris v. Express Co.*, 183 N. C. 147 (1f); *Dixon v. Davis*, 184 N. C. 210 (3p); *Fuller v. R. R.*, 214 N. C. 652 (1f).

JAMES I. WOOTEN, TRUSTEE OF CECIL C. WOOTEN, v. E. H. HOBBS AND WIFE, HELEN R. HOBBS, ET ALS.

(Filed 10 November, 1915.)

1. Wills—Interpretation—Intent.

Where the language used by the testator in writing his will clearly and explicitly expresses his intent as to the disposition of his property, the intent, as thus gathered, is controlling, and nothing is left open to construction. The rules for interpreting a will discussed by WALKER, J.

2. Wills—Named Devisees—Survivors—Lapsed Devises—Descent and Distribution.

Where there is a legacy or devise in a will to certain children of the testator, then in being, by name, and any of them die before the testator, those living will not take the share of the deceased one, as survivors, but the legacy or devise will lapse, and go, as property undisposed of by the testator, to the latter's next of kin, unless otherwise provided by statute, or unless other disposition thereof be made by the will.

3. Wills—Interpretation—Children—Named Devisees—Codicil — Revocation—Entire Interest.

A devise of lands to several of the testator's children by name, for life, with direction that if one or more of "my said children shall die without leaving child or children or issue of such, then his or their share or shares to the surviving child or children of such for life in the same manner as the original shares therein." By codicil, the testator revoked the devise to one of his children, C., "expressly withdrawing and recalling . . . the entire interest devised to him," and devising the same to his other children, naming them, for life, "subject to the same and identical rights, privileges and provisions as to the survivorship and limitations over," etc. L., a son, died without child since the death of the testator. *Held*, the devise to the testator's children was not to them as a class, but individually, the interest of C., described in the codicil, being the entire interest in the devise, whether original, vested or contingent, which, in express terms, goes to the other of the testator's named children, who come within the terms of the devise to them.

APPEAL by plaintiff from order of *Bond, J.*, heard at chambers (212) on 18 October, 1915; from GREENE.

Controversy without action to determine title to land, submitted to the Court, under Revisal, sec. 803, for its decision and judgment.

Simeon Wooten died in Lenoir County, leaving a last will and testament, duly admitted to probate, and in the tenth item thereof he devised his land in Green County as follows: "I loan to my six children, Leonard E. Wooten, Helen R. Hobbs, Mary V. Peele and John S. Wooten, Cecil C. Wooten, and Lester D. Wooten, for and during their natural lives, with the right to enjoy the same and to receive the rents and profits regularly accruing therefrom, my lands situate in the county of Greene, State of North Carolina, known as the William I. Wooten place, containing about five hundred acres, and the Rachel Moye tract, lying near the same, containing about one hundred and sixty acres. It is my desire, and I direct, that if my said children shall desire to hold during their lives their respective shares in said lands in severalty, that they shall have the right to do so by partition of the same. If one or more of my said children shall die without leaving child or children him or her surviving, or issue of such child or children surviving, then in that event I loan and direct that the share or shares of him or her or them dying without child or children or issue of such child or children, shall go to and remain in the possession during their lives of my surviving child or children, to be holden by them during their lives in the same manner as the original shares therein under this my will. At the death of such of my children, one or more, as shall die leaving child or children surviving or issue of such child or children surviving, I give and devise said lands, including the original shares loaned by this my will, and also any and all addition thereto, by

survivorship, to his or her child or children so surviving, to have and to hold to them, the said surviving child or children, the respective share or shares of their several parents, and their heirs, in fee simple forever."

By the first item of a codicil to his will he revoked this devise as to his son, Cecil C. Wooten, in the following terms: "It is my will that
(213) my son, Cecil C. Wooten, shall have no interest in my Greene County lands, known as the William I. Wooten place, containing about five hundred acres, and the Rachel Moye place, containing about one hundred and sixty acres, and I do hereby expressly withdraw and recall from my said son, Cecil C. Wooten, the entire interest which I devised to him in said Greene County lands in item tenth of my said will. In accordance with my desire I loan the said interest intended for my said son, Cecil C. Wooten, in said item to my other five children, Leonard E. Wooten, Helen R. Hobbs, Mary V. Peele, John S. Wooten and Lester D. Wooten, for and during their natural lives, subject to the same and identical rights, privileges and provisions as to survivorship and limitations over as are specifically prescribed and set forth in said tenth item."

Since the death of Simeon Wooten, his son, Leonard E. Wooten, has died intestate and without children, having never been married. James I. Wooten, trustee of Cecil C. Wooten and plaintiff in this action, contends that his *cestui que trust* takes an equal interest with his brothers and sisters above named in that part of the two tracts of 500 acres and 160 acres devised by the tenth item of the will to Leonard E. Wooten, now deceased, upon the ground that the codicil does not deprive him of any interest in said land originally devised to his brothers and sisters, or either of them, but only revokes the devise of said land originally made to him; while defendants contend that the codicil not only revokes the devise of an interest in the land originally made to Cecil C. Wooten, but its legal effect is to deprive him of any and every interest whatsoever, either vested or contingent, in the land described in item ten of the will, and therefore he acquired no interest therein by the death of Leonard E. Wooten, and that no interest either original or accrued passed to Cecil C. Wooten, because of the said codicil.

The case states: "The purpose of this controversy without action is to ascertain the interest, if any, of the said Cecil C. Wooten, in the two tracts of land mentioned in the tenth item of the will of the said Simeon Wooten, which two tracts of land are situated in Greene County, and are those mentioned in item first of the codicil of the said Simeon Wooten; and the purpose of this controversy is limited to said inquiry."

The judge ruled that the children of the testator, Helen R. Hobbs, Mary V. Peele, John S. Wooten and Lester D. Wooten, share equally

in the portion of the land devised to Leonard E. Wooten under the tenth item of the will, and the first item of the codicil thereto, said land being the William I. Wooten place, containing 500 acres, and the Rachel Moye place, containing 160 acres, and that James I. Wooten, as trustee of Cecil C. Wooten, has no interest of any kind, either vested or contingent upon survivorship, in the land mentioned in the tenth item of the will and the first item of the codicil, the same being the land known as the William I. Wooten tract of 500 acres and the (214) Rachel Moye tract of 160 acres, and judgment was rendered accordingly, from which the plaintiff appealed, assigning as error the above two rulings.

L. L. Levinson for plaintiff.
Loftin, Dawson & Manning for defendants.

WALKER, J., after stating the case: Where the meaning of the testator or other maker of a written instrument is not plainly expressed, we must resort to construction in order to ascertain the intention, but when there is no uncertainty in the language used and it expresses a clear and definite purpose, construction is not necessary. It has been said by one of the standard text-writers that "the will of a competent testator, and every part thereof, presumably expresses an intelligible intent; i.e., means something. When the language, in view of all the circumstances, can have but one meaning, there is no room for uncertainty. Construction is the method employed to ascertain the intent of the testator, as expressed in the will, when the language used to that end is susceptible, under the circumstances, of more than one meaning. Its sole function is to remove uncertainty regarding testamentary intent." Gardner on Wills, 364. Where construction is called for, the intention must be gathered from the will itself, as read, in view of all the facts and surrounding circumstances, and certain rules have been adopted as aids in the construction of the will, their sole aim being to disclose the testator's intent as embodied in the language of the will. The writing, in which the will must be expressed, contains the only testamentary intention that the law will effectuate. This intention must be found within the four corners of the instrument or nowhere. Hence extrinsic evidence is inadmissible to show an intent not contained in the document itself. But when the will is such as to call for construction, the court, with a view to securing a proper construction, puts itself, so far as may be, in the position of the testator, that it may see things from his point of view. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible. Gardner on Wills, pp. 383, 385. Wigram on Wills,

142. It may be well to say that persons named specifically in a will, that is, by name or other personal and particular designation, do not generally take as a class, but individually. *Todd v. Trott,* 64 N. C., 283.

It was said in *Mebane v. Womack,* 55 N. C., 301, "Had the will given the property to the children of Frances McAden, without naming them, then they could have taken as a class only, but, by naming them, they became legatees individually," citing with approval what is said by the *Lord Chancellor* in *Knight v. Gould,* 2 Myl. and Keene Rep., 295, to this effect: "A bequest to children living at the tes-
(215) tator's death is on all hands admitted to be a bequest to the class, and it survives to those who shall answer the description by surviving the testator, but it is said the words 'hereinafter named' are added, and that these words added to a bequest to 'children' would make the description cease to be that of a class. Assuredly it would, because such words are used for the very purpose of specifying certain of the children, and therefore they must specifically exclude the supposition of a class being intended." We may profitably add one or two more authorities which come nearer to the question we have under consideration: "As a general rule only those persons can participate as survivors in a gift who are specifically included in the designation made in the will or answer the conditions annexed to the gift, and persons expressly excluded cannot share as survivors under other general conditions or designation in the will. The survivors, however, can only share in such property as is included by the will in the gift to survivors. In the absence of language showing a contrary intention, the share of a deceased beneficiary in case of survivorship will be divided among the survivors in equal shares." 40 Cyc., at p. 1509. It has been uniformly held with us that when a legacy or devise is given to certain persons then in being by name, and any of them die before the testator, those living will not take his share, as survivors, but the legacy or devise will lapse, and go, as property undisposed of by the testator, to the latter's next of kin, unless otherwise provided by statute or unless other disposition thereof be made by the will or a codicil, or in the absence of contrary provisions in the will. *Sawyer v. Trueblood,* 5 N. C., 190; *Barnes v. Shannonhouse,* 29 N. C., 9; *Johnson v. Johnson,* 38 N. C., 426; *Hinton v. Lewis,* 42 N. C., 184; Gardner on Wills, pp. 441 to 455. Keeping these principles in mind, we do not think the meaning of the will in question will be hard to find. The intention of the testator is clearly expressed in the paper-writing, and, therefore, there is no room for doubt or construction; but if the language may fairly be regarded as even somewhat ambiguous, an interpretation of it, by the ordinary rules applicable in such cases, would not alter our view as to what the testator intended. As Leonard E. Wooten died without hav-

ing married, the matter is much simplified. It is plain that the testator intended to give the property to his children, not as a class, but individually, as he called them by their names, and each one took his share subject to the further provision in the event of any one or more of them dying without leaving child or children. If there had been no amendment of the original will, Cecil C. Wooten would have taken an equal share with his brothers and sisters and in the same manner as they in the same event would have taken under the will; but his father, for some reason best known to himself, and presumably because of some change in conditions or circumstances, determined to revoke the gift to his said son, not only in respect of the original share devised (216) to him, but also of any accrued share. In other words, his final will was that Cecil should take nothing whatever in the lands situated in Greene County and described in the tenth item of the will and the first item of the codicil. The opening sentence of the latter clearly manifests this purpose: "It is my will that my son, Cecil C. Wooten, shall have *no interest* in my Greene County lands (describing them), and I do hereby expressly withdraw and recall from my said son, Cecil C. Wooten, the *entire* interest which I devised to him in said Greene County lands in the tenth item of my said will." He then substitutes his other children, by name, for him in the said devise, "subject to the same and identical rights, privileges and provisions, as to survivorship and limitations over, as specifically prescribed and set forth in said tenth item." Language could not be more explicit for conveying the idea that Cecil was to be cut off entirely and completely from any kind of interest or estate in the Greene County land, whether vested or contingent. The testator first declares that "he shall have *no interest*" in the land, but the entire interest so devised to him shall go to his brothers and sisters. He had devised two kinds of interest to him in the tenth item, one directly to him without dependance on the happening of any event, and the other contingent upon any of his other children dying without leaving a child. The latter was an interest, though contingent, and as much so as the original devise to him, which, of course, was vested, and being an interest, he is excluded from any and all right to it by the provision of the codicil that he shall have *no* interest therein formerly devised to him, but the *entire* interest shall go to the others.

We have italicized the important and most significant words. His Honor's construction of the will was, therefore, correct, and we affirm his judgment.

Affirmed.

Cited: Satterwaite v. Wilkinson, 173 N. C. 39 (1f); *Bowden v. Lynch,* 173 N. C. 207 (1f); *Cecil v. Cecil,* 173 N. C. 413 (1f); *Grantham v. Jin-*

nette, 177 N. C. 238 (1j); *Trust Co. v. Thorner,* 198 N. C. 245 (1f); *Reynolds v. Trust Co.,* 201 N. C. 279 (1f); *Stephens v. Clark,* 211 N. C. 90 (1f, 2p); *Trust Co. v. Holt,* 215 N. C. 648 (1f); *Smyth v. McKissick,* 222 N. C. 653 (2b); *Electric Supply Co. v. Burgess,* 223 N. C. 100 (1f).

J. J. LLOYD v. R. J. BOWEN.

(Filed 10 November, 1915.)

1. Negligence—Runaway Horse—Trials—Evidence—Questions for Jury.

In an action to recover damages for a personal injury alleged to have been caused to the plaintiff by a runaway horse, there was evidence tending to show that the defendant tied his spirited horse, four years of age, knowing its habits and disposition, to a dead limb of a tree, in an open space in a populous business portion of the town, in full view of a street, and left him there all day without food and attention; and that about 3 o'clock in the afternoon, after the horse had several times shown restlessness and tried to break away, he broke off the dead limb and ran away through the cleared space to the street and upon the plaintiff, causing the injury alleged: *Held,* the previous knowledge of the defendant as to the disposition of the horse, and the external (217) appearance of the limb, or the impression made upon him at the time as to its reliability, are but details of the evidence, which taken together in its several aspects was sufficient to carry the case to the jury, under the application of the rule of the prudent man. The question as to whether it was necessary for the defendant to have had previous knowledge of the disposition of the horse, discussed by WALKER, J.

2. Same—Requested Instructions—Appeal and Error.

Where damages for a personal injury are sought in an action upon the alleged negligence of the defendant in tying his spirited four-year-old horse in an open space in the populous portion of the city, to the dead limb of a tree and leaving him there all day, a requested instruction making the defendant's liability depend upon his previous knowledge and the appearance of the limb to which he tied him is too restricted in its scope, and objectionable as confining the answer of the jury to matters relating to only one phase of the case, when there are several upon which the defendant's actionable negligence may be founded.

3. Negligence—Runaway Horse—Trials—Instructions.

Where the negligence alleged in an action to recover damages for a personal injury inflicted by a runaway horse, with evidence to support it, is that the defendant tied his young and restless horse to a dead limb of a tree in a populous portion of the city, and left him there, an instruction to the jury is proper that to constitute negligence it was not required that the defendant should have been able to foresee that by his conduct the injury would result to the plaintiff exactly as it did, but if

he reasonably could have foreseen that injury would result to someone, it was sufficient. *Drum v. Miller*, 135 N. C., 204, cited and applied.

4. Negligence—Instructions—Proximate Cause.

Where the charge of the court to the jury is excepted to on the ground that it did not define the doctrine of proximate cause in a proper case, or that it improperly left out this element to the appellant's prejudice, the charge will be construed as a whole, and there is no reversible error when it appears in several parts of the charge that the judge instructed the jury that they must not only find that there was negligence on the defendant's part, but also that it must have caused the injury, and that the jury could not have been misled by the charge.

APPEAL by defendant from *Cline, J.*, at June Term, 1915, of FORSYTH.

Civil action tried before *Hon. H. R. Starbuck, judge,* and a jury, in Forsyth County Court at its June Term, 1915, taken by appeal of defendant to the Superior Court, on matters of law, and heard by *Hon. E. B. Cline, judge presiding,* at September Term, 1915, of Forsyth Superior Court, when the judgment upon a verdict in favor of the plaintiff for $500 was affirmed and an appeal taken by defendant to this Court.

The plaintiff, on 8 February, 1915, was walking on the sidewalk of Main Street in Winston-Salem, when he was knocked down and seriously injured by a runaway horse owned by the defendant. He brought his suit 29 April following in the Forsyth County Court to recover damages for the injuries he had sustained. The specific allegations of negligence in the complaint are, in effect, that defendant was negligent in that he tied his horse to the dead limb of a tree in an open space, unprotected by fencings or railings, near Liberty Street, which was a (218) populous and a much traveled street; that after tying him at this place, he permitted him to remain standing there nearly all day without food, care or attention; that for several hours previous to his breaking or restless, broke this dead limb and ran away.

There was evidence to the effect that the horse was a high-spirited animal, only about four years old, and had been brought in from the farm of the defendant on that morning and left standing in front of defendant's stables, hitched to a dead limb within a hundred feet of Liberty Street and in plain view of that street, without any barrier or fencing between the horse and the street. It was also in evidence that the horse had stood there all day and until the afternoon, without any food, care or attention; that for several hours previous to his breaking this dead limb he was rearing and jumping and kicking up his heels, trying to break loose. His actions attracted the attention of the clerks at work in the postoffice, about a block distant. At about 3 o'clock in the afternoon the horse pulled on his halter, which broke the dead limb from the tree, and he ran away, crossing the open space in this

vacant lot to Liberty Street; then he crossed Liberty Street, and went through a vacant space in the next block to Main Street, where he struck the plaintiff. The plaintiff sustained painful and serious injuries; he was picked up from the street in a practically unconscious condition, and was taken in an automobile to the hospital, and upon examination by the physicians it was found that about four of his front teeth were knocked out and he was cut and bruised on his body—several of the cuts were in his face.

The plaintiff, J. J. Lloyd, testified: "I had a conversation with Mr. Bowen after the injuries. Mr. Bowen said that his horse was a high-spirited horse and had been standing there all the morning without anybody looking after it, and that, it being a little cool, he was full of life. He just broke the limb and ran away. He said the horse had been brought from his farm and hitched there that morning. He said he had not been fed. It was a chilly day in February."

C. E. Hamilton, witness for plaintiff, testified: "On 8 February my attention was called directly to this horse. He was just playing and kicking and running around and rearing; just playful, is all I can say. I could not say how long he had been standing hitched there. The first time I noticed him that day was about 1 o'clock in the afternoon. I had not noticed him before, as my work in the morning is in the front part of the postoffice, and in the afternoon my work is in the back of the postoffice. I do not know how he was hitched to the tree. I saw him when he broke loose. I was standing in the back door of the postoffice. The horse was playing and rearing and kicking up, and at that time I saw him break loose and I heard the limb pop, and he dashed (219) across the roadway and almost stopped, as the limb was hanging to the reins, and when the limb hit the ground it seemed to scare him, and he ran then as hard as he could go, and he ran through the alley by the postoffice. I did not see what happened on Main Street. I took it to be a dead limb that he was hitched to, as it had that appearance. It popped like a dead limb when it broke off, and it looked like a dead limb as the horse went by the alley."

The defendant testified for himself that he did not have the conversations with the plaintiff and his wife, as they stated on the stand, and he did not tell them, or anybody, what they had so stated, or any of it. That the horse was four years old, but not high spirited and rather lazy, and so gentle that ladies could ride him. He had a blanket on him the day he was hitched to the limb. It was a cold day. He had not been used very much. Witness did not tie him. The horse was hitched 100 feet from Liberty Street, but there was a large house between him and the street, which cuts off the view from the street and a horse stable cuts it off from the north.

There was evidence on the part of defendant that the limb was green and sound and the horse was hitched "high up" to prevent him from rubbing his mane.

There was much other evidence for the respective parties of a similar kind.

Louis M. Swink for plaintiff.

Frank T. Baldwin and Lindsay Patterson for defendant.

WALKER, J., after stating the case: The first three prayers for instruction involved substantially the rule of the purdent man, and from a careful inspection of the charge it appears that it was fully responsive to them. It makes no difference in what form a request for instructions is given, or with what particular language it is expressed, the judge is not bound to adopt the words of counsel, but may choose his own, provided he does not thereby weaken the force of the instructions which are requested to be given. If he gives them in substance, though not with literal conformity, it will be quite sufficient, as we have so often held. *Chaffin v. Mfg. Co.*, 135 N. C., 95; *Wilkie v. R. R.*, 127 N. C., 203; *Cox v. R. R.*, 126 N. C., 103; *Mitchell v. Corpening*, 124 N. C., 472. We said in *Chaffin's case, supra:* "The plaintiff cannot insist that the court should have given these instructions in the very language employed in framing them. It is a sufficient response to prayers if the court, in its own words, chosen, perhaps, so as not to do any injustice to either side, gives the instructions substantially, provided that the party who asks for them will have the full benefit of the principles of law he seeks to have applied to the facts." And in *Baker v. R. R.*, 144 N. C., 36: "It is also true that the court is not obliged to adopt the very words of an instruction, asked to be given, provided, in (220) responding to the prayer, it does not change the sense or so qualify it as to weaken its force," citing *Brink v. Black*, 77 N. C., 59.

The court correctly defined negligence and proximate cause, and also properly applied the rule of the prudent man to the facts as the jury might find them to be. The question of negligence in regard to the horse did not depend, in this case, solely upon defendant's previous knowledge of his vicious or unruly habits. It would be a circumstance to be weighed with others disclosed by the evidence.

The fourth prayer, as to the external appearance of the limb, and the impression made upon the defendant concerning its strength and reliability, and as a proper one for the purpose of hitching the horse to it, was but a detail of the evidence and was fully embraced by the instruction given. Besides, it was too restricted for the conclusion drawn from it by defendant in the prayer that the first issue should be answered

"Yes." There were other important considerations entering into the question of negligence.

The instruction which is the subject of the fifth exception was correct in itself. It merely stated the principle of *Drum v. Miller,* 135 N. C., 204, that, in order to constitute negligence, it was not required that defendant should have been able to foresee that by his conduct the injury would result to plaintiff exactly as it did, but if he could reasonably foresee that injury would result to some one, it was sufficient; and as to the objection that the court omitted to charge as to the proximate cause in this instruction, but made an affirmative answer to the first issue depend solely upon a finding that there was negligence, it may be said that the court had twice, if not oftener, told the jury in direct and explicit language that they must not only find that there was negligence on the part of the defendant, but that it caused the injury to the plaintiff, and they could not have been misled by it. The charge must be viewed as a whole and according to its context. *Everett v. Spencer,* 122 N. C., 1010; *Westbrook v. Wilson,* 135 N. C., 402; *Aman v. Lumber Co.,* 160 N. C., 374; *McNeill v. R. R.,* 167 N. C., 390. His Honor's definition of an accident was the approved one. *Crutchfield v. R. R.,* 76 N. C., 320; *Raiford v. R. R.,* 130 N. C., 598; and it was correctly applied to the facts and distinguished from negligence.

In regard to the liability of owners of animals for injuries committed by them, *Judge Thompson* thus states the governing principles: "The tendency of the modern law to assimilate the liability of the owner of domestic animals for injuries committed by them to negligence in all cases, without reference to proof of knowledge of a vicious propensity in such animals, is illustrated in a large class of holdings, some of them ancient, which, however, relate chiefly to damage done by escaping horses, cattle, etc. The result of these holdings may be substantially
(221) stated to be that the liability of a keeper of horses, cattle, etc., for allowing them to escape upon the public streets, in case they there do damage to travelers or others lawfully upon the streets, does not rest upon any conception of the vicious character of the animals, but rests upon the question whether the keeper was guilty of negligence in permitting them to escape. And here the same rule in regard to what is and what is not negligence obtains as in most other situations. It is the legal duty of every person having charge of an animal to apportion the care with which he uses it to the danger to be apprehended from a failure to keep it constantly under control. He must use such care as is demanded by the circumstances which he knows or may reasonably believe surround him." 1 Thompson Negligence, sec. 849, and cases cited.

We understand *Judge Thompson* to mean that knowledge by the owner of the vicious propensities of his horse is not always essential to a recovery in an action for injuries alleged to have been caused by the owner's negligence. There may be negligence apart from this, but if the owner is not otherwise negligent and the injury is caused by the viciousness of the horse, then knowledge must be shown in order to charge the owner; but where there are other circumstances tending to show negligence, knowledge of the animal's habits or propensities, or the want of it, may be considered in connection with them. The owner, of course, will not be allowed to plead ignorance when by the exercise of ordinary care he could have acquired the requisite knowledge. But, at last, it all comes to the question of ordinary care and the rule of the prudent man, and no general rule applicable to all cases, other than the one just mentioned, can well be laid down. In this case, though, we need not decide these questions, as there is ample evidence, we think, that the defendant had knowledge of the disposition and habits of this animal, although there was some evidence to the contrary.

We are not inadvertent to the principle declared in *Spring Co. v. Edgar,* 99 U. S., 645 (25 L. Ed., p. 487, note and cases cited), but there were some facts and circumstances in that case which are not to be found in this record. There was evidence of negligence here apart from the question of knowledge of the peculiar characteristics of the horse, inclining him to be breachy, unruly or dangerous. When the case of *Spring Co. v. Edgar, supra,* is properly considered, it will be found to sustain the views herein stated, for we do not understand that case to hold that knowledge of the habits of the animal is necessary to be shown where there is negligence in the management or control of the animal which caused the injury. But whatever it decides, the evidence in this case brings it well within the principles there applied.

The case was correctly tried and there is no ground for a reversal.

No error.

Cited: Rector v. Coal Co., 192 N. C. 807 (1f); *S. v. Lee,* 196 N. C. 716, 717 (Rule applied that party is entitled to have requested instruction, correct in itself, and arising on evidence, given in substance); *Jordan v. Hatch,* 198 N. C., 540 (Rule applied that giving of requested instructions in substance is sufficient); *Clark v. Martin,* 217 N. C. 442 (Same as *S. v. Lee, supra*); *Gardner v. Black,* 217 N. C. 576 (1b); *Plumidies v. Smith,* 222 N. C. 328 (1f); *Bethune v. Bridges,* 228 N. C. 624 (1b).

(222)

T. M. STARNES v. RALEIGH, CHARLOTTE AND SOUTHERN RAILWAY COMPANY.

(Filed 1 December, 1915.)

1. Principal and Agent—Railroads—Right of Way—Agency—Ratification.

When a railroad company accepts a deed from the owner of land for a right of way across it, procured by one who had assumed to act without its authority, its acceptance of the benefits thereof amounts to a ratification of the agency of the one so acting, to the same extent as if the act had theretofore been directly authorized, and it is held responsible for the representations made in its behalf in procuring the conveyance.

2. Principal and Agent—Evidence—Declarations—Res Gestæ.

The relevant declarations of one acting for a railroad company in procuring a right of way for the company from the owner of lands are competent evidence as a part of the *res gestæ* in the owner's suit to set aside the conveyance for fraud in its procurement.

3. Fraud—Deeds and Conveyances—Railroads—Right of Way—Trials—Evidence—Questions for Jury.

A false affirmation made by a person to defraud another, whereby that other person receives damages, is the ground of an action in the nature of deceit; and where there is evidence that a railroad company has procured a right of way from the owner of the land, an ignorant and illiterate person, through the statement of its agent, a neighbor of the owner, that the railroad could take his land for the purpose and forbid his crossing from one part of his farm to the other, and it was then agreed that the company would locate the right of way over a certain place, which it did not do, but did so over a richer and cultivated portion, under an agreement in the writing giving the company full choice of location; and further evidence that these representations were knowingly false to the agent: *Held*, sufficient for the determination of the jury upon the question of fraud in the procurement of the deed, and to set the deed aside on that ground.

4. Railroads—Deeds and Conveyances—Rights of Way—Fraud Damages.

Where the owner of land brings suit against a railroad company to set aside a deed to a right of way for fraud, and the right of way has been located at a different place from the one contemplated, for which no compensation was to have been made, it is incompetent to show, upon the issue of damages, that the lands taken were not worth more than those contemplated; for the fraud, when sufficient and established, sets aside the conveyance in its entirety, and permits the owner to be compensated for the right of way actually taken by the defendant.

APPEAL by defendant from *Lane, J.*, at March Term, 1915, of MECKLENBURG.

Civil action tried upon these issues:

1. Is the plaintiff the owner of the lands described in the complaint? Answer: Yes.

2. Did the defendant enter upon the lands of the plaintiff and lay off and appropriate to its use as a right of way for railroad purposes a strip of land one hundred feet in width, extending in the rear of the plaintiff's house and barn through the said lands a distance of about one-half mile? Answer: Yes.

3. Did the plaintiff execute the paper-writing set forth in para- (223) graph three of the defendant's answer, and recorded in book 305, page 139? Answer: Yes.

4. Was the execution of the said paper-writing procured by fraud and misrepresentation, as alleged in the plaintiff's replication? Answer: Yes.

5. What compensation, if any, is the plaintiff entitled to recover of the defendant for entering upon said lands and appropriating the said right of way for railway purposes? Answer: $825.

From the judgment rendered defendant appealed.

J. D. McCall, Newell & Newell for plaintiff.

Tillett & Guthrie for defendant.

BROWN, J. The plaintiff seeks to recover permanent damages for the appropriation of a right of way through his farm by defendant. The right of way is immediately in the rear of the plaintiff's residence and within twenty-five steps of his barn, and runs the entire length of the farm one hundred feet in width. The excavation is sixteen and a half feet deep and thirty-six feet wide.

The evidence shows that the land actually appropriated by the defendant was between six and seven acres. The excavation cut the plaintiff off from the main part of his plantation, and was cut through a twenty-acre field of his finest farming land. Incidental to taking the right of way, the defendant destroyed $200 worth of cotton.

The defendant claims immunity from liability for this damage by virtue of a deed executed by defendant 3 June, 1912, granting to the defendant a right of way in fee simple across his lands as said railroad may be finally located, which strip of land shall be one hundred feet in width—that is to say, fifty feet on each side of the center of the main line of the track.

It is alleged by plaintiff that the deed granting this "blanket right of way" was executed at the instance and by reason of the false and fraudulent representation of one Thomas W. Allen. The defendant denies such allegation and relies upon these defenses:

1. That Allen was not its agent and that it is not bound by his representations.

2. That there is no sufficient evidence of fraud.

There is no evidence that Allen was the duly appointed agent of defendant to procure the right of way. It appears that in order to procure the construction of a much needed railroad, Allen volunteered to procure rights of way for defendant. Nevertheless, the defendant is bound by all that Allen did and said in order to procure the execution of this deed, which is made directly to defendant and not to Allen. The defendant does not claim to be a purchaser for value without no-
(224) tice, for it paid nothing for the right conferred. When it accepted the deed for the right of way proccured by Allen, it accepted it *cum onere*. It could not hold on to the gift and at the same time repudiate all responsibility for the manner in which it had been obtained.

Whether duly appointed for that purpose or not, there is evidence that defendant knew that Allen was procuring rights of way in that neighborhood to facilitate the construction of its road, for which the defendant paid nothing. The defendant ratified Allen's acts, and is consequently responsible for them.

The relation of principal and agent may be created by ratification with the same force and effect as if the relation had been created by appointment, as where one person adopts and takes the benefit of an act done without his authority or in excess of it. 1 Mechem, sec. 435; *Porter v. R. R.*, 132 N. C., 71; *Trollinger v. Fleer*, 157 N. C., 81; *Taylor v. Nav. Co.*, 105 N. C., 484.

It is contended that there is no sufficient evidence of fraud and that the court should have so charged, as requested. In this connection it is insisted the court should have excluded the declarations of Allen testified to by plaintiff. They were plainly competent as part of the *res gestæ*, having been made immediately preceding and at the time of the execution of the deed and being the cause of its execution. These declarations are the basis of plaintiff's cause of action. He must first prove these representations before he can establish their false and fraudulent character.

The plaintiff testified that at the time he executed the deed for the blanket right of way this conversation took place between him and Allen, and in consequence of which Allen said he signed the paper, viz.:

"This paper was presented to me by Mr. Thomas Allen. He is a neighbor and lives right below me, about two miles away. He presented the paper to me. It was not drawn in my presence. I did not read this paper-writing. Mr. Allen read some of it. I can't read to do no good."

The plaintiff further testified: "Well, he said that the railroad could go through my land in spite of me. They could condemn it, and if they did, they would not allow me to cross it nor anything, and I told him then, I says, 'Mr. Allen, I tell you what I will do. I will sign the right

of way to go by the rock road between my house and the big road.' And he said, 'If you do that I will see that the road is put there.' "

Q. Why did you sign this paper giving him a right of way over your land at all? A. I done it because I was afraid they would just ruin me.

There is further evidence which warrants the inference that Allen knew at the time that the railroad would not be located by the rock road, that he knew he had no control of its location, and that he used such fraudulent device to induce plaintiff to execute the deed.

As soon as Allen secured plaintiff's signature to the right of way (225) paper, he went to Robert Beaver's place, who lived four hundred yards southwest of plaintiff on the same road. In answer to the question as to what Allen said to him, Beaver replied: "Well, he (Allen) came up to Mr. Starnes' that morning, and to Mr. Ritch's, and got them to sign it; and from there he came on to my house to get me to sign it; and I said to him, 'Did Mr. Ritch and Mr. Starnes sign?' And he says, 'Mr. Ritch didn't; but Mr. Starnes did. I had to tell him a chunk of a lie to get him to do it.' "

It is not incumbent upon us to pass on the competency of this evidence, which was admitted by the court, as no such assignment of error is set out or commented on in appellant's brief, and it is well settled that we will not consider others, although exception may have been taken at the trial. The representations in this case were not of a harmless promissory kind, but, if the evidence is to be believed, were representations of a most material character, and if knowingly false, were made with the deliberate purpose to deceive. At least the jury seems to have been so impressed by the evidence.

It is well settled that a false affirmation, made by a person with intent to defraud another, whereby that other receives damage, is the ground of an action in the nature of deceit. *Pasley v. Freeman,* 2 Smith L. C., 1300.

Chancellor Kent said in *Upton v. Vail,* 6 Johns, 181: "The case went not upon any new ground, but upon the application of a principle of natural justice long recognized in the law—that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." *March v. Wilson,* 44 N. C., 144; *Leonard v. Power Co.,* 155 N. C., 10; *Griffin v. Lumber Co.,* 140 N. C., 514.

In respect to the issue of damages, the defendant contends substantially that the court should have permitted it to prove that the land in front of the house by the rock road which the plaintiff offered to give was worth as much as the land which the defendant took on the rear of the house, and that the damages should be abated to the extent of the value of the other piece of land by the rock road. This position cannot be

maintained. When the deed to the defendant is set aside upon the ground of fraud, it is as void as if it had never existed, and the defendant cannot claim any rights under it. *Wilson v. Lewis, ante,* 47.

It does not follow that because the plaintiff was willing to give land located upon one part of his place that the defendant acquired the right to seize a right of way on another part of his plantation. When the defendant entered upon the land of the plaintiff and took possession of it it did so under its power of eminent domain, and cannot (226) justify under a deed which has been declared void on the ground of fraud. It thereby became liable to the plaintiff for actual value of the land taken, together with the crops destroyed, and in so charging the jury the judge committed no error.

Upon a review of the entire record we find.

No error.

Cited: Brimmer v. Brimmer, 174 N. C. 440 (1f); *Leigh v. Telegraph Co.,* 190 N. C. 704 (1f); *Respess v. Spinning Co.,* 191 N. C. 811 (1f); *Maxwell, Comr. of Revenue, v. Ins. Co.,* 217 N. C. 767 (1f).

W. H. RAY ET AL. v. G. B. PATTERSON, J. L. McMILLAN, ET AL.

(Filed 1 December, 1915.)

1. Equity—Deeds and Conveyances—Correction—Mortgages—Quantum of Proof.

A suit to declare that the title conveyed by deed to the defendant was under an agreement that he should hold the legal title until the plaintiff should pay off certain mortgages and then a conveyance of the land be made by the defendant to the plaintiff, is, in effect, one to correct the defendant's deed and convert it into a mortgage, placing the burden upon the plaintiff to establish his allegations by strong, clear and convincing proof; and an instruction by the court that he is required to do so by the preponderance of the evidence is reversible error to the defendant's prejudice.

2. Same—Questions for Jury.

The question of whether the plaintiff has met the legal requirement of showing by strong, clear and convincing proof that the deed he seeks to correct was, in fact, intended for a mortgage, is one exclusively for the jury, it being within the province of the court only to lay down the rule of law applicable.

3. Equity—Deeds and Conveyances—Correction—Mortgages—Agreements —Right of Redemption.

Where a conveyance of land is corrected so as to make the transaction, in effect, a mortgage, no agreement therein can deprive the mortgagor of his right to redeem, for equity will regard the substance and not the form.

4. Equity—Deeds and Conveyances—Correction—Verdict—Judgment.

This suit was to declare that the defendant's deed to lands was acquired under an agreement with the plaintiff that the former should convey the lands to the latter upon his paying off certain outstanding mortgages. Upon this issue the trial judge incorrectly charged as to the quantum of proof required, and the plaintiff moved for judgment upon the verdict on other issues, finding that the defendant was the owner of the notes and mortgages at the time of the execution of his deed, and that the value of the land was $3 per acre, and upon the ground that they established the relationship of mortgagor and mortgagee, and inadequacy of the price: *Held*, these matters were but evidentiary under the circumstances of this case, upon the question of whether the transaction concerning the defendant's deed was as the plaintiff claimed, and were not sufficient upon which to base a judgment either in plaintiff's or defendant's favor.

APPEAL by defendant from *Allen, J.*, at April Term, 1915, of (227) HOKE.

Civil action. The case was before us at a former term, and is reported in 165 N. C., at p. 512. We then ordered a new trial. At the last trial the case was submitted to the jury upon issues which were answered by the jury as follows:

1. Did the defendants procure the execution of the deed described as Exhibit D, and in form a fee-simple deed, by the promise that they would hold the land therein described as security for the sum advanced in taking up certain mortgages described in the pleadings, with the further promise that they would reconvey said lands to the plaintiffs on payment of said debt secured by the mortgages? Answer: Yes.

2. Did the defendant, Walter McMillan, procure from the plaintiff, D. McN. Ray, the execution of the deed to his wife, described as Exhibit E, upon the consideration of services rendered him in inducing the defendants G. B. Patterson and J. L. McMillan to take up the mortgages described in the pleadings? Answer: Yes.

3. What was the value of the land described in Exhibits D and E at the time of the execution of the deeds therefor set out in the pleadings? Answer: $3 per acre.

4. Were the defendants J. L. McMillan and G. B. Patterson the owners of the notes and mortgages set out in the pleadings at the date of the execution of the deed to them by W. H. Ray and D. McN. Ray, described as Exhibit D in the pleadings? Answer: Yes.

Upon the first issue the court charged the jury that only a preponderance of evidence was required to justify a finding in favor of the plaintiffs. The defendants excepted to this instruction, and, from the judgment on the verdict, appealed to this Court.

McNeill & McNeill, Broadfoot & Broadfoot, Oates & Herring, Hamilton & McMillan and V. C. Bullard for plaintiff.

McLean, Varser & McLean, Sinclair, Dye & Ray for defendant.

WALKER, J., after stating the case: We need not consider the many exceptions in the record, as we are of the opinion that the charge of the court upon the first issue, which is set out above, is erroneous. The plaintiffs sought to convert a deed absolute on its face into a mortgage, or, in other words, to correct the deed in that respect. In such cases the rule is thoroughly settled that the evidence must be clear, strong and convincing to warrant a verdict in favor of the party seeking to correct the deed. *Ely v. Early,* 94 N. C., 1; *Harding v. Long,* 103 N. C., 1; *Cobb v. Edwards,* 117 N. C., 253; *Avery v. Stewart,* 136 N. C., 426; *Lehew v. Hewett,* 138 N. C., 6; *King v. Hobbs,* 139 N. C., 171; *White v. Carroll,* 147 N. C., 330; *Gray v. Jenkins,* 151 N. C., 80; *McWhirter v. McWhirter,* 155 N. C., 145; *Glenn v. Glenn,* 169 N. C., 729. The (228) subject is fully discussed, and the reasons for the rule stated, in *Lamb v. Perry,* 169 N. C., 436. Where the object of the action is to set aside a deed on the ground of fraud the rule is different and only a preponderance of evidence is required, as will appear from the foregoing authorities, and *Perry v. Insurance Co.,* 137 N. C., 402. Equity will reform a written contract or other instrument *inter vivos* where, through mutual mistake of the parties, or the mistake of one of them, induced by the fraud or inequitable conduct of the other, it does not, as written, truly express their agreement. Eaton Equity, sec. 618; *Warehouse Co. v. Ozment,* 132 N. C., 839.

It was said in *Robinson v. Willoughby,* 65 N. C., 520: "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this is held to be a mortgage in a court of equity, and the debtor has a right to redeem. Coote Mort., 22; Fisher Mort., 68. It is immaterial whether the contract be in one writing or in several (*Mason v. Hearne,* 45 N. C., 88), and it is also immaterial (as between the parties) whether the agreement for redemption be in writing or oral; and such agreement may be implied from the attending circumstances. Of these principles, and of the circumstances which will cause a deed absolute on its face to be construed as a mortgage, numerous illustrations may be found in the treatises above cited, and in our own Reports."

There is ample evidence shown in this record to sustain the allegation of the plaintiffs that the deed executed by them to defendants, and described in the case, was intended as a mortgage or as security for the money advanced by them in the transaction, and even if, to our minds, it may appear to be clear, strong and convincing, we are not at liberty to say so, nor could the trial judge so state to the jury, as it is for the jury alone to say whether it is of that character. *Lehew v. Hewett, supra.* The judge is at the limit of his right when he submits the evidence to the jury with the caution that, in order to entitle the plaintiff to a verdict, it must be clear, strong and convincing, but if the jury so find it to be, then it becomes their duty to return a verdict accordingingly. The law favors the position of a mortgagor, so that it has grown into a maxim that once a mortgage always a mortgage. If a transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem, such a case being, on grounds of equity, an exception to the maxim *"Modus et conventio vincunt legem."* Nor can a mortgagor, by any agreement at the time of the execution of the mortgage, that he shall lose his right to redeem if the money be not paid by a certain day, debar himself of such right, for in such a contract time will not be regarded as of its essence. *Robinson v. Willoughby, supra; Mason v. Hearne, supra.* If, therefore, the jury found from the facts and attendant circumstances that this deed, while absolute in form, was really intended (229) as a mortgage, the plaintiffs will have the right to redeem the land as much so as if it had in form been a mortgage, for in such matters equity does not regard so much the form as it does the substance.

It may be that in giving the instruction as to the *quantum* of evidence required in order to justify a verdict for the plaintiff, the learned judge was misled by the form of the first issue, but we think the issue was proper in form, and that the substance of the inquiry embraced by it is, whether the deed was intended to be a mortgage or security for the money advanced, and this, of course, would require a correction of the deed if the jury so find, in order to express the true intention of the parties, and, therefore, the rule as to the quantum of proof applies.

The plaintiffs contended that the verdict as to the remaining issues entitled them to judgment, but we do not think so. There is not quite enough found by the jury to permit a decree either setting aside the deed or declaring it to be only a security for the debt. There is evidence which is sufficient, in law, to justify such findings, but we cannot found a judgment of the court upon mere evidence. It must rest upon facts found by a jury or in some other method allowed by statute. Plaintiffs mainly relied upon the answers to the last two issues, which they contend establish the relation of mortgagor and mortagee, together with

the fact that the price given for the land was grossly inadequate. But we cannot think that mortgages which were acquired after the treaty, preceding the execution of the deed, had been fully made, the mortgages being held by other parties at the time of the treaty, established the relation of mortgagor and mortgagee of a kind to bring the case within the principle of *McLeod v. Bullard,* 84 N. C., 515 (*s.c.,* 86 N. C., 210), and that class of cases, which declare that such "a relation is always a circumstance which creates suspicion and aids in the proof of an allegation of oppression and undue advantage, when there is gross inadequacy of price and other circumstances tending to show fraud." *McLeod v. Bullard,* 86 N. C., 213, 214; *Chapman v. Mull,* 42 N. C., 292. The agreement between the parties, whether it be as contended by the plaintiffs or by the defendants, contemplated that defendants should take up the debts and mortgages, either for the purpose of being canceled or surrendered, if the transaction was a sale, or of being held by them until the plaintiffs had redeemed, according to their version of the treaty. But this does not prevent the retention of possession by the plaintiffs after the execution of the deed (if not satisfactorily explained), the nonpayment of rent, the failure of defendants to cancel or surrender the notes, the inadequacy of price, and any other relevant fact or circumstance from being considered by the jury in passing upon the principal question, whether the deed was intended as a mortgage, or whether the real agreement was that the defendants should advance the necessary amount of money and take
(230) up the debts and mortgages, with the understanding that the deed should stand as a security for the same, with the ultimate right of redemption in the plaintiffs.

But with the verdict now before us, and an error in the charge as to the first issue, we cannot extend the relief which the plaintiffs seek. It may be regrettable that a third trial should be had, but we are constrained by the law to grant it.

New trial.

Cited: Champion v. Daniel, 170 N. C. 332 (1p); *Grimes v. Andrews,* 170 N. C. 523 (1f); *Poe v. Smith,* 172 N. C. 73 (1p); *Newton v. Clark,* 174 N. C. 394 (1d, l); *Boone v. Lee,* 175 N. C. 384 (1f); *Lea v. Utilities Co.,* 176 N. C. 513 (1p); *Williamson v. Rabon,* 177 N. C. 306 (1d, l); *Long v. Guaranty Co.,* 178 N. C. 506 (3p); *Ricks v. Brooks,* 179 N. C. 207 (1d); *McRae v. Fox,* 185 N. C. 348 (1j); *Perry v. Surety Co.,* 190 N. C. 291 (1p); *Jessup v. Nixon,* 199 N. C. 123 (1p); *O'Briant v. Lee,* 212 N. C. 802 (1d); *Davenport v. Phelps,* 215 N. C. 328 (1).

VANCE PAUL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 December, 1915.)

1. Railroads—Escaping Steam—Frightening Horses — Negligence — Evidence—Trials—Questions for Jury.

In an action to recover damages of a railroad company for an injury inflicted by reason of the plaintiff's mule becoming frightened by the defendant's locomotive, evidence tending to show that the mule became frightened at the steam arising from the locomotive in starting it, that the steam complained of was usual, in such instances, and not caused willfully or wantonly, is not sufficient to take the case to the jury upon the question of defendant's negligence.

2. Negligence—Proximate Cause.

Negligence to be actionable must be the proximate cause of the injury for which damages are sought.

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

Ordinarily the question of proximate cause of an injury arises from the evidence as an issue of fact for the jury under proper instructions, and not solely as a matter of law.

4. Same—Continuing Cause—Independent Cause—Concurring Cause.

Where a railroad company has blocked the street of a town in violation of an ordinance, and, in consequence, one driving a mule has driven to another crossing, and there his mule became frightened by steam escaping from a locomotive on the track of the same company and causing injury, in his action to recover damages therefor it is held that the escaping steam, while in itself affording no evidence of negligence, concurred with the continuing negligence of the defendant in blocking the street, but not as an independent or intervening cause; and that the conditions being within the knowledge of the defendant, the negligent act was the proximate cause of the injury, being that without which it would not have occurred; and that under the evidence of this case an issue as to defendant's actionable negligence was properly submitted to the jury.

5. Torts—Tort-Feasors—Anticipated Consequences.

The rule holding the tort-feasor liable for his act does not require that the particular injury complained of must be foreseen or anticipated by him, but that some injury may follow the wrongful act.

WALKER and BROWN, JJ., dissenting.

APPEAL by defendant from *Allen, J.*, at April Term, 1915, of (231) CUMBERLAND.

Action for the recovery of damages for personal injuries, alleged to have been caused by the negligence of the defendant.

The plaintiff's evidence tended to show—the defendant not having introduced any evidence—that the plaintiff, a white man about 35 years old, with one Hagan, drove a mule, hitched to a buggy in which they

were riding, into the town of Parkton, about 2 o'clock in the afternoon of 26 January, 1914. Desiring to go on the east side of the defendant's track, they found some of the street crossings blocked by a freight train. The plaintiff got out of the buggy and walked around the train, and, after transacting certain business, came back to the buggy. They then drove to the upper northernmost crossing, and, finding that one blocked, drove down a street parallel to and fifteen feet from the train for a distance of about four hundred yards, with the purpose of going to a lower crossing, which was not blocked. Just as they reached the engine—the train being headed south—steam came out from under the engine and the wheels began to turn, scaring the mule, causing him to run away, and plaintiff was thrown out of the buggy, suffering injuries.

There was no evidence that the escaping steam was unusual or extraordinary, or that the escape was permitted willfully or wantonly, and the noise and escape of the steam was usual and ordinary in the starting of a train. There was in evidence an ordinance of the town of Parkton which provided a penalty for a railroad to block the street for more than five minutes, and also evidence that the streets had been blocked for a longer time than five minutes.

The defendant introduced no evidence and moved for judgment as in case of nonsuit. This motion was overruled and defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Sinclair, Dye & Ray for plaintiff.

Rose & and Rose for defendant.

ALLEN, J. It is established by the evidence that the defendant blocked a public crossing in the town of Parkton with a train of cars in violation of the ordinance of the town, and this is negligence; but a plaintiff cannot recover upon proof of negligence alone. He must go further and show that the negligence complained of is the proximate cause of his injury. *Ledbetter v. English,* 166 N. C., 125; *McNeill v. R. R.,* 167 N. C., 390. The real controversy, therefore, between the plaintiff and the defendant on the issue of negligence, raised by the motion for judgment of nonsuit, is whether there is any evidence that the
(232) negligence of the defendant in violating the ordinance of the town was the proximate cause of the injury.

Much of the difficulty in the application of the doctrine of proximate cause arises from the effort on the part of the courts to give legal definition to what is essentially a fact, and, in most cases, for the determination of a jury, but perhaps the most complete and accurate statement of the rule is to be found in the oft quoted opinion of *Mr. Justice Strong*

in *R. R. v. Kellogg,* 94 U. S., 469. He says: "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or, as in the oft cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. . . . In the nature of things there is, in every transaction, a succession of events more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Again, the same judge says in *Insurance Co. v. Boone,* 95 U. S., 117; "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time and place. The inquiry must always be whether there was an intermediate cause disconnected *from the primary fault* and self-operating, which produced the injury."

In *Harvell v. Lumber Co.,* 154 N. C., 261, this statement of the law was approved, the Court saying: "Proximate cause means the dominant, efficient cause, the cause without which the injury would not have occurred; and if the negligence of the defendant continues up to the time of the injury, and the injury would not have occurred but for (233) such negligence, it is not made remote because some act, not within the control of the defendant, and not amounting to contributory negligence on the part of the plaintiff, concurs in causing the injury."

Another definition of the term is that given by Shearman and Redfield on Negligence, sec. 26, and approved in *Harton v. Telephone Co.,* 141

N. C., 455, and in *Ward v. R. R.*, 161 N. C., 184, that "The proximate cause of an event must be understood to be that which, in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time and space, however, is no part of the definition."

If either of these authorities is followed the question of proximate cause was for the jury, because the "facts constitute a continuous succession of events so linked together as to make a natural whole"; the escape of steam was not "disconnected from the primary fault," but operating with it; the negligence of the defendant in violating the ordinance was "the cause without which the injury would not have occurred."

The defendant contends, however, that these principles have no application to this case because, he says, the evidence shows that there was a new intervening cause, the escape of the steam, which was not negligent, and that this was the real cause of the injury to the plaintiff. There are two answers to this position. The first is, that the escape of the steam did not intervene between the negligence of the defendant and the injury to the plaintiff, but was concurrent. The train of the defendant was still blocking the crossings in violation of the ordinance of the town at the time the steam escaped, and the negligence of the defendant was then existing and operating.

The second is, that the escape of the steam was the act of the defendant and, while innocent within itself, was associated and connected with the negligence of the defendant, and was permitted by the defendant with a knowledge of the conditions surrounding the plaintiff.

Some of the authorities hold that no cause can operate as an intervening cause and thereby insulate the previous negligence of the defendants unless it is wrongful (Shearman and Redfield on Negligence, sec. 36), but the better rule and the one generally adopted is that to have this effect it must be disconnected from the negligent act, and must be a cause which could not be reasonably foreseen or anticipated. *Harton v. Telephone Co.*, 141 N. C., 455; *Ward v. R. R.*, 161 N. C., 183; 29 Cyc., 499; *R. R. v. Renny*, 42 Md., 137; *Shippers Co. v. Davidson*, 35 Tex. Civ. App., 561; *R. R. v. Webb*, 116 Ga., 152; *Pastene v. Adams*, 49 Cal., 87; *Grimes v. R. R.*, 3 Ind. App., 576; *Chacy v. City of Fargo*, 5 No. Dak., 176; *Osburn v. Vandyke*, 113 Iowa, 558; *Cornelius v. Huttman*, 44 Neb., 447; *Gas Co. v. Getty*, 96 Md., 685.

(234) As illustrating the rule, it was held in the *Gas Co. case* that one who had put a defective gas pipe in a house was liable for an injury caused by an explosion which was brought about by a policeman going in with a lighted candle to investigate; in the *Osburn case*, that one who was wrongfully beating a horse when his foot slipped, causing him

to miss his blow and strike the plaintiff, was liable; in the *City of Fargo case,* that the city was liable to one injured by a hole in the street across which there was a plank, and where the injury was caused by one riding a bicycle striking the plank as the plaintiff passed, thereby injuring him; and, in the case from Georgia, that the plaintiff was entitled to recover damages against a railroad company which, by its negligence, had caused him to be thrown from a train on which he was a passenger, thereby throwing him upon a track where he was injured by a train of another company using the track without negligence on its part.

The cause of *R. R. v. Renny,* 42 Md., is particularly pertinent to the position that the defendant cannot by its own act relieve itself from the consequences of its negligence.

The Court says in that case: "In the application of the maxim, *In jure non remota causa sed proxima spectatur,* there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties as to causation that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, may be looked to in determining the rights and limitations of the parties concerned. . . . But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his own wrong, and that, as a loss has actually happened whilst his wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss if that cause was put in operation by his own wrongful act."

The case from Texas is in principle practically identical with the one before us. In that case the defendant had obstructed a street by erecting a gangway thereon, leaving a space for the passage of vehicles, and a horse of the plaintiff, while he was driving along the street, was frightened by the noise made by an employee in rolling cotton upon the gangway, and ran away and seriously injured the plaintiff. The objection was made to a recovery that the gangway did not cause the injury and that the noise made by the employee was an intervening proximate cause, but the Court said: "The act of moving the truck rapidly down the gangway, producing the noise that frightened the horse, was inseparably connected with the unlawful structure. It required the gangway as well as the moving of the truck to produce the result. (235) They were active concurring forces producing the result. The intervening act of the negro in rolling the truck immediately behind the

buggy and frightening the horse did not supersede the original unlawful act in putting the obstruction in the street."

If these principles are applied to the evidence, we are of opinion that there was no intervening cause and that the motion for judgment of nonsuit was properly denied, and if we discard legal definition, and take a practical, reasonable view of the evidence, the same conclusion will be reached.

If you were to ask a reasonably intelligent person, "Would the plaintiff have been injured but for the escape of steam?" he would answer "No," but if you asked the same person, "Would he have been injured if the defendant had not negligently blocked the crossing?" he would give you the same answer, and this would seem to demonstrate that the concurrence of the two acts of the defendant (one negligent and the other within itself innocent) caused the injury, and, if so, the defendant cannot escape liability unless the plaintiff was guilty of contributory negligence. "Negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes other than plaintiff's fault, is the proximate cause of the injury." 29 Cyc., 497.

The negligence of the defendant continued and was in operation up to the very time of the injury, and, not only could the defendant have reasonably foreseen and anticipated what did occur, but it had actual knowledge of conditions up to the time the mule began to run.

It knew that it was violating an ordinance and, therefore, guilty of negligence; that the plaintiff, in the exercise of a right, had approached the crossing and was endeavoring to pass; that he was prevented from doing so by its negligent act; that he was trying to extricate himself from the condition and situation produced by the defendant; that he was passing the engine in his effort to do so, and that it was permitting the steam to escape from its engine in the direction of the mule, which was not more than ten or fifteen feet distant, and the only facts which it did not know were that the mule would run away and that the plaintiff would be thrown out, and it was for the jury to say whether this result could be reasonably anticipated.

The rule is not that the particular injury must be foreseen or anticipated, but that some injury may follow the wrongful act. *Drum v. Miller,* 135 N. C., 213.

The question of contributory negligence was submitted to the jury under proper instructions, and it could not have been declared as matter of law under the evidence in the record. *Dunn v. R. R.,* 126 N. C., 343.

There are several exceptions taken by the defendant, but the (236) principles we have discussed cover all of them that are relied on in the defendant's brief.

No error.

WALKER and BROWN, JJ., dissenting.

Cited: Lutterloh v. R. R., 172 N. C. 118 (4p); *Taylor v. Stewart,* 172 N. C. 204, 205 (3f, 4p); *Hinton v. R. R.,* 172 N. C. 589 (3p); *Taylor v. Lumber Co.,* 173 N. C. 115 (2f, 3f); *Lea v. Utilities Co.,* 175 N. C. 464 (2f, 3f); *Ridge v. High Point,* 176 N. C. 424 (2f, 3f, 4p); *Mfg. Co. v. Hester,* 177 N. C. 613 (2f, 3f, 4p); *Stultz v. Thomas,* 182 N. C. 473 (3f); *Graham v. Charlotte,* 186 N. C. 666, 667 (3f, 4p); *Ramsey v. Oil Co.,* 186 N. C. 740 (4p); *Hinnant v. Power Co.,* 187 N. C. 295 (3f); *DeLaney v. Henderson-Gilmer Co.,* 192 N. C. 651 (3f); *R. R. v. Maxwell, Comr. of Revenue,* 207 N. C. 746 (3f, 4p).

ROSENBACHER & BROTHER v. F. R. MARTIN AND WIFE.

(Filed 10 November, 1915.)

1. Parties—Demurrer—Answer—Waiver—Appeal and Error.

Upon the filing of an answer to a complaint the right to demur on the ground that the defendants are not sufficiently designated is waived, and where in this state of the pleadings the action is decided against the defendants in a court of a justice of the peace, who appeal to the Superior Court, it is reversible error in the latter court to sustain the demurrer.

2. Parties—Pleadings—Process—Amendments — Court's Discretion — Interpretation of Statutes.

Amendments to pleadings are liberally allowed in the discretion of the courts, in order that substantial justice may be done between the parties, except when the effect of the amendment is to allege, substantially, a new cause of action; and where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the Superior Court to allow the plaintiff to correct the mistake, both in the process and pleadings. Revisal, secs. 495, 507, 509, 510.

APPEAL by plaintiffs from *Cline, J.,* at September Term, 1915, of FORSYTH.

Civil action to recover on an account for goods sold and delivered, brought before a justice of the peace, who heard the same, upon the

issue of indebtedness raised by the parties, and gave judgment in favor of the plaintiff for $63.19, with interest and costs. Defendants appealed. In the magistrate's court they had answered to the merits, denying the indebtedness, and, as stated, the case was tried on this issue. In the Superior Court, as the record states, the defendants, without withdrawing their answer by leave of the court first obtained, filed a demurrer to the effect that the plaintiff's name is not set out in the process and complaint (but only a firm name), and, therefore, there is no plaintiff before the court. The judge sustained the demurrer and dismissed the action because, as he said, he had no discretion in the matter, believing from the syllabus in *Heath v. Morgan,* 117 N. C., 504, that the objection could be raised, as upon demurrer, notwithstanding the answer, or by a motion to dismiss. Judgment dismissing the action was thereupon entered, and plaintiff appealed.

(237) *Louis M. Swink and W. Read Johnson for plaintiff.*
No counsel for defendant.

WALKER, J., after stating the case: The course pursued was quite irregular practice. The defendant had gone through the justice's court pleading to and trying upon the merits. His answer waived, or, as is sometimes said, overruled, the demurrer. *Ransom v. McClees,* 64 N. C., 17; *Finch v. Baskerville,* 85 N. C., 205; *Moseley v. Johnson,* 144 N. C., 257. The defect of parties, if there is one, appeared upon the face of the record, and the objection should have been taken by demurrer in the beginning. Revisal, sec. 474 (4) *Davidson v. Elms,* 67 N. C., 228; *Machine Co. v. Lumber Co.,* 109 N. C., 576. A defendant cannot demur and answer at the same time. By answering to the merits all defects are waived, except an objection to the jurisdiction of the court or to the defectiveness of the cause of action (Revisal, sec. 478), which objection can be made at any stage of the case. The judge cited *Heath v. Morgan,* 117 N. C., 504, as depriving him of the discretion to allow an amendment, which he would have done had he possessed the power. In that case, the court below had overruled the demurrer, there being no answer, and this Court sustained it, but without ordering the action to be dismissed and without, also, any intimation that the trial court could not allow an amendment in its discretion, which it clearly had the right to do, as we will presently show, if it would not change substantially the nature of the action, which would not be done here by the proposed amendment. We will advert to one expression in that case before parting with it. The Court said: "The cases of *Wall v. Jarrott,* 25 N. C., 42, and *Lash v. Arnold,* 53 N. C., 206, while they sustain judgments taken in the firm name, both

admit that if the objection had been to the 'writ' it would have been good. This was evidently the rule under the old practice. And while the Code has made many changes in the forms of actions and mode of procedure, we do not think it has made any change in this respect." The Court evidently overlooked Code, sec. 273, now Revisal, sec. 507, to which we will refer again more at large. The case of *Palin v. Small*, 63 N. C., 484, which is cited by the Court in *Heath v. Morgan, supra,* was an action of assumpsit, under the old and antiquated system of pleading which has been supplanted by the present more liberal system of pleading and procedure, and, therefore, it does not apply now, nor did it decide this point. It held only that there was no material variance between the writ or process and the declaration. The writ was in the name of three persons trading under a certain firm name, as plaintiffs, while the declaration ran in the name of the individuals themselves without the affix. It was held that the latter was mere surplusage, and, being eliminated, there was an exact correspondence between writ and declaration. That is not this case, nor was it the case (238) in *Heath v. Morgan.*

We do deny the power of the judge to allow, in his discretion, a withdrawal of the answer in a proper case (*Finch v. Baskerville, supra*), but the answer in this case was not withdrawn. The judge had ample power to permit an amendment of the process and pleadings. There was only a misnomer, or misdescription of the plaintiff, which could be amended without changing the nature of the action. This power is found in Revisal, sec. 507, which is as follows: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations, material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved." This language is plain and unmistakable in its meaning and broad enough to include this case. The object of the present procedure is to try cases on their merits and not on technicalities and refined distinctions of the old system of special pleading, under which the victory depended too much upon the skill of the pleader, rather than upon the merits of the successful party's case. Our system is far more liberal, and seeks, first of all things, to try each case upon its facts and without so much regard to form. Its main purpose is to avoid miscarriages of justice by mere slips in pleadings, and, therefore, it requires that pleadings be construed sensibly, "with a view to substantial justice between the parties" (Revisal, sec. 495); that "in every stage of the action" the court shall disregard any error or de-

fect in pleadings or proceedings not affecting the substantial rights of the adverse party (Revisal, sec. 509); and then there are other provisions equally as liberal, and especially with regard to defects in the names of parties. Revisal, secs. 510 and 507. It would be a great reproach to the administration of law if so slight a departure from the name should result in the defeat of justice. The court should have rejected the demurer, allowed the amendment, if one at that stage of the case was needful, and proceeded to try the case upon its actual merits, and it erred in not doing so.

Error.

Cited: Cherry v. R. R., 185 N. C. 91 (1b); *Sheffield v. Alexander*, 194 N. C. 744 (2f); *Adams v. Woodie*, 200 N. C. 407 (1f); *Lee v. Hoff*, 221 N. C. 237 (2f); *Ezzell v. Merritt*, 224 N. C. 607 (1b).

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J. E. LATHAM COMPANY v. E. C. ROGERS; FIRST NATIONAL BANK OF MULLINS, S. C., INTERVENER.

(Filed 1 December, 1915.)

1. **Bills and Notes — Negotiable Instruments — Fraud — Holder in Due Course—Burden of Proof.**

   Where it is established that the draft and acceptance sued on was procured by the original payee by falsely and fraudulently representing the character of wares or merchandise—the grade of cotton, in this case —for which it was given, an intervener in the action, claiming the instrument as a holder in due course, has the burden of proving that he paid full value for the draft and that he was a *bona fide* purchaser, before maturity and without knowledge of the infirmity.

2. **Pleadings — Answers — Admissions — Interveners — Bills and Notes— Fraud—Due Course—Trials—Directing Verdict.**

   Where the defendant is sued for damages for fraudulently and falsely representing the grade of cotton sold and delivered to the plaintiff, for which the latter had given his acceptance, and an intervener in the action claims as a holder of the paper in due course, it is reversible error for the court to admit the defendant's answer in evidence, which admits that the plaintiff is a *bona fide* holder of the draft in due course, without notice of the infirmity in the instrument, when the controversy is solely between the plaintiff and the intervener; and the statements in the answer being of no more effect than the defendant's *ex parte* affidavit, it is proper for the trial judge to direct a verdict for the plaintiff, if the evidence is found by the jury as a fact, in the absence of other evidence.

APPEAL by plaintiff from *Lyon, J.*, at June Term, 1915, of GUILFORD.

Civil action tried upon these issues:

1. Did the defendant E. C. Rogers procure from the plaintiff, J. E. Latham Company, the acceptance and payment of the draft described in the complaint by falsely and fraudulently representing by his invoices the grades of the cotton covered by said invoices, and paid for by said drafts? Answer: Yes.

2. What amount of damages, if any, is plaintiff entitled to recover of the defendant? Answer: One thousand dollars.

3. Did the intervener, the First National Bank of Mullins, South Carolina, purchase said drafts for value before maturity in good faith, and without notice of any infirmity, defect or fraud therein? Answer: Yes.

From the judgment rendered plaintiff appealed.

Brooks, Sapp & Williams for plaintiff.
Justice & Broadhurst, Thomas S. Beall for intervener.
No counsel for defendant Rogers.

BROWN, J. This action is brought to recover damages against defendant Rogers on account of false and fraudulent representation of the grades of a certain lot of cotton covered by invoices (240) attached to certain drafts. The jury assessed the damages of the plaintiff against the defendant at the sum of $1,000.

As there is no appeal by defendant Rogers, it must be taken that there are no errors arising upon the findings of the jury in respect to him. The only assignments of error, therefore, to be discussed relate to the third issue.

The first assignment of error is because the court allowed the intervener to introduce in evidence upon the trial four paragraphs of the defendant Rogers' answer. These paragraphs tend to prove that the intervener paid Rogers full value for the drafts, the proceeds of which have been garnisheed in this action. The issue of fraud having been found against defendant Rogers, the burden of proof then rested upon the intervener to satisfy the jury that it paid full value for the drafts and that it was a *bona fide* purchaser without knowledge of the infirmity. *Bank v. Fountain,* 148 N. C., 590; *Bank v. Exum,* 163 N. C., 203.

Bank v. Brown, 160 N. C., 24, is relied upon by the intervener to establish the proposition that the burden rests upon the plaintiff to show that the intervener had knowledge of the infirmity. In that case there was no finding of fraud and no evidence tending to show it, and, therefore, the burden of proof was not shifted; and if the construction placed upon that opinion by the intervener's counsel is warranted, then the language used by the judge was inadvertently used. It is undoubt-

edly well settled that where fraud is shown in the execution of the note, or other evidence of debt, the holder thereof who claims to be a *bona fide* purchaser for value without notice must satisfy the jury of those facts.

We think the assignment of error must be sustained. There was no issue raised by the pleadings or submitted to the jury between the intervener and defendant Rogers. The whole contest, in respect to the third issue, was between the plaintiff and the intervener. Rogers' answer was, therefore, nothing more than an *ex parte* affidavit and was evidently offered for the purpose of getting before the jury Rogers' statement to the effect that the intervener was a *bona fide* purchaser of the drafts for value. The proper method would have been to have put Rogers on the witness stand or to have taken his deposition in the regular way.

It is said, however, that the court admitted the answer only as against Rogers and not as against the plaintiff. Assuming that to be true, the court should then have given the plaintiff's prayer for instruction, namely, that if the jury believe the evidence, they should answer the third issue "No." For there was no other evidence offered by the intervener except the answer of Rogers, and if that was offered only against Rogers, then there was no evidence as against the plaintiff tending
(241) to prove that the intervener was a *bona fide* purchaser in good faith for value. So, whichever way you take it, there was error, for which there must be a

New trial.

HAMLET GROCERY COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 1 December, 1915.)

Penalty Statutes—Consignor Aggrieved—Filing Claim—Origin of Shipment.

A consignor of a shipment of goods is required by the statute to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within ninety days, etc. Revisal, sec. 2634.

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

APPEAL by defendant from *Allen, J.*, at April Term, 1915, of HOKE.

Civil action tried upon a waiver of trial by jury.

It appears by the findings of fact that, on 20 October, 1913, the R. J. Reynolds Tobacco Company, as consignor, at the request of the plaintiff, delivered to the Southern Railway Company, at Winston, N. C., twenty caddies of tobacco and received from it for transportation and delivery to Farmers Furnishing Company at Raeford, N. C., a bill of lading, describing the tobacco company as consignor, by which the railway company agreed to ship the tobacco to the Farmers Furnishing Company, as consignee, at Raeford, N. C., the freight being prepaid. Ten of the caddies were safely delivered in sound condition, and the ten others were lost by the Southern Railway Company while they were in its possession. It is stated in the case, as one of the facts found by the judge, "that the said Farmers Furnishing Company charged the value of the lost caddies of tobacco, to wit, $34, to the plaintiff, Hamlet Grocery Company, from whom it had purchased the same, and transferred and released to the plaintiff its claim for the loss"; but it does not appear when this was done. On 9 December, 1913, plaintiff filed a written claim for said loss with the agent of the Aberdeen and Rockfish Railroad Company at Raeford, N. C., which consisted of certain papers, to wit, bill of lading and a written statement not verified, of the account, charging said A. & R. R. Company with the value of the ten boxes of tobacco which were lost, or $34, and which further stated that they had been shipped by the Reynolds Tobacco Company for plaintiff's account to the Farmers Furnishing Company, were lost and the claim for their value transferred by the Farmers Furnishing Company to plaintiff by release. No claim was filed with the de- (242) fendant's agent at the point where the goods were delivered by it, or its agent, to the next common carrier in the course of transportation, nor does it appear that, at the time the claim was filed with the agent of the A. & R. R. Company at Raeford, N. C., the defendant, or said A. & R. R. Company, or any of the carriers, in the connecting line, or their agents, had knowledge of any transfer of its claim for damages by the Farmers Furnishing Company to the plaintiff, except only information given by the claim itself. The part of the statute relevant to this case is as follows:

"Every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid within ninety days in case of shipments wholly within the State, and within four months in case of shipments from without the State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee, or at the point of origin by the consignor, when it shall appear that the consignor was the owner of the shipment: *Provided,* that no such claim shall be filed until after the arrival of the shipment, or some part

thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof."

The statute then imposes a penalty of fifty dollars for failure to adjust the claim within said period of time, "to be recovered by any consignee aggrieved (or the consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is therefore the party aggrieved)."

It was agreed that the defendant formally tendered the $34, interest and costs, before the trial, and that said tender was rejected.

The court gave judgment for the claim, $34, the penalty, $50, and the costs. Defendant appealed.

J. W. Currie for plaintiff.

Manly, Hendren & Womble and McIntyre, Lawrence & Proctor for defendant.

WALKER, J., after stating the case: We will consider the case upon three questions:

First. Plaintiff was not the consignee named in the bill of lading, which contains the full contract with the carrier for the transportation and delivery of the tobacco. In the first place it is stated in the case that he had sold the goods to the Farmers Furnishing Company,
(243) and therefore the property in them passed at once to it. Secondly, the latter company was the consignee, according to the contract of shipment, and was so designated in the bill of lading. When the goods were lost and it transferred its claim to plaintiff, the property in the goods did not pass and plaintiff did not thereby become consignee, but only acquired the right to sue for the damages, or the value of the goods. Neither the Farmers Furnishing Company nor the plaintiff, nor both of them, had the right to change the contract of shipment, or the relation of the parties thereto, by making the plaintiff the consignee against the will or without the consent of the defendant as carrier. The plaintiff, by the transfer to him by the Farmers Furnishing Company, acquired a chose in action, or the right to recover the value of the goods as damages for a breach of the contract, as upon a conversion of them, and in no sense did he become consignee. Nor can the plaintiff recover as consignor. By selling the goods to the plaintiff, and also by having them shipped by the Reynolds Tobacco Company on an open bill of lading to the Farmers Furnishing Company, the absolute property in the goods passed to the latter and plaintiff retained no interest, legal or

beneficial, in the goods. His only claim was for the price thereof, and he has not since acquired any interest in the goods as consignor, no more than he has as consignee, as we have shown, because the transfer to him was only for the value of the goods or damages, due to the Farmers Furnishing Company for their loss, that is, he got an open account for a sum of money due to it, and nothing more.

Second. If he had been consignor or consignee, he has not presented his claim as required by the statute, which requires that it shall be filed with the agent of the company that lost the goods; if it is the last carrier in the course of the shipment, then with his agent at the point of destination," and if an intermediate carrier, then with his agent at the point of his delivery to another carrier, or at the point of origin by the consignor, if he has retained the ownership of the goods. The claim was filed with the agent of the A. & R. R. Company at Raeford, N. C., the point of destination, but that company did not lose the goods, as the case states, but the defendant company. Nor is the A. & R. R. Company sued in this action. It was not filed with defendant's agent at the point where it delivered the goods to the next carrier in the route, nor was it filed by the consignor "at the point of origin," even if he had any right to file it at all, and certainly he did not have this right as consignor. It is familiar learning that penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all other instruments, but not liberally, so as to stretch their meaning beyond what the words will warrant. 36 Cyc., 1185, 1186, 1187; *Sears v. Whitaker,* 136 N. C., 37. The Court, in *Alexander v. R. R.,* 144 N. C., 93, 99, dis- (244) cussing a statute of the same kind as the one under consideration, said: "Applying the rule by which courts should be guided in the construction of a penal statute, *Bynum, J.,* in *Coble v. Shoffner,* 75 N. C., 42, says: 'It cannot be construed by implication, or otherwise than by express letter. It cannot be extended, by even an equitable construction, beyond the plain import of its language. If, therefore, even the intent of the Legislature to embrace such a case was clear to the Court from the statute itself, we cannot so extend the act, because such a construction is beyond the plain import of the language used.' It is said that we should see in the statute the evil intended to be remedied, and so construe it that such evil may be repressed and the remedy advanced. This is undoubtedly the general rule in the construction of statutes. This suggestion has been heretofore made and disposed of by the same learned judge. 'In construing a penal statute, we are not allowed, as in the case of those which are not penal, to look at the motives or the mischief which was in the legislative mind. The rule is peremptory that the case must

fall within the plain language of a penal statute before the penalty can attach.' *Ib.*, 44. As was said by *Mr. Justice Ashe* in *Whitehead v.* R. R., 87 N. C., 255: 'The rigid rules of the common law with reference to the liability of common carriers should not be applied to a case involving the violation of a penal statute.' Such has been the uniform rule of construction from the earliest times."

And in *Cox v. R. R.*, 148 N. C. 459, 460, the Court said, in discussing the same subject: "It is a well-established principle of law, applicable to corporations and individuals alike, that penal statutes are strictly construed, and that he who sues to recover a penalty awarded by the law must bring his case clearly within the language and meaning of the law. *Sears v. Whitaker*, 136 N. C., 37; *Appenheimer v. R. R.*, 64 Ark., 27; 26 Am. and Eng. Enc. (2 Ed.), p. 658." So we see that, by this ancient rule of the law, which has ever been approved and sanctioned by the courts, even to the present time, as one that is reasonable and just, we must hold the plaintiff to the strictest construction, and not broaden the meaning of the statute in his favor to include a case not within the words and, therefore, not within its intention. It seems that he has failed, at every point, to show his right to the penalty he now claims. It is not necessary to decide whether a penalty, such as this one is, can be assigned, for it has not been transferred, but only the debt, using that word in its general and comprehensive sense as meaning a sum of money due from one to another without regard to the form of the obligation or the manner in which it accrued.

Third. It appears that plaintiff, if he had any cause of action, has not filed his claim in due and proper form. The defendant, as carrier,

(245) was not bound to pay a claim to anybody who might present it, but only to the consignor or consignee named in the bill of lading, or if his claim for damages had been assigned, then there must be some reasonably satisfactory evidence of the assignment before he would be bound to pay, otherwise the carrier might be subjected to a double or even a greater liability. The ownership of the claim by the one who files it should be authenticated in some way. His mere assertion of ownership will not do. The carrier must make a true delivery, for, like any other bailee, he will act at his peril if he delivers to any one but him who is entitled to receive the goods, and he is, therefore, entitled to evidence that the demand upon him is rightful. Here the bill of lading was not produced duly endorsed to plaintiff, or any other reliable evidence of his right to claim the damages tendered. The defendant was consequently in the exercise of its right when it refused to pay. 6 Cyc., 470, 471, 472. In this case, so far as the record shows, and the bill of lading, the consignee, Farmers Furnishing Company,

was the only one entitled to receive the goods or to recover for their loss, as there was no legal evidence to the contrary.

It is suggested that defendant admitted the claim for damages, and therefore the right to recover the penalty followed as an incident. But this is not a logical, legal or just conclusion. The recovery of the claim for damages rests upon principles far different from those which entitle plaintiff to the penalty. The latter is governed by the provisions of the statute, and the former by the rules of the common law. It is admitted that the alleged right to the penalty was not assigned, and plaintiff does not sue as assignee, but as the "real consignor," and as (therefore) the party aggrieved who is entitled to recover the penalty. But if he is the consignor, it was a condition precedent to his right to recover the penalty that he should have filed his claim at the place where the shipment originated, for the statute so provides. But the plaintiff was not the *nominal* or *real* consignor, who was the shipper, and, besides, as the goods were shipped on an open bill of lading the title passed, at once, on receipt of the goods by the carrier, to the consignee, and the consignor, even Reynolds & Co., lost all interest in them, as much so as if they had sold and actually delivered them to the consignee, the Farmers Furnishing Company at Raeford, N. C. It is not a fact which appears in the record, nor is it true according to plaintiff's own showing, that the latter company gave to the plaintiff a statement of the consignee, which was attached to the claim of loss filed with the railroad company (not this defendant) at Raeford, showing that the plaintiff alone, by assignment, was interested in the loss, even if this would have availed the plaintiff so as to entitle it to recover the penalty.

The claim for damages contained only plaintiff's own statement of certain matters upon which defendant, if the claim had been filed with it, was not bound to rely, or to accept as true. It is further (246) contended that defendant should have objected, when the claim was filed at Raeford, that it was not done at Winston, the place from which the shipment started, the answer to which is conclusive, that there is only *one* carrier sued, the Southern Railway Company, and it was not at Raeford to object when the claim was filed and it may be added that the claim never was filed with this defendant, as the statute provided that it should be. It was not required of this defendant to state the grounds of objection to a recovery of the penalty, when the claim for damages was filed with another company, or even if it had been properly filed with it. It denied the plaintiff's right to recover the penalty, and it was then incumbent on the plaintiff to show that the penalty had accrued to it in the manner provided by the statute, which requires that a precise demand shall be made, in a specified way, and at the proper place, before any penalty shall be recovered. As the goods were lost on the line

of defendant (Southern Railway Company), the claim and demand should have been made on it at the point where it delivered the goods to the next carrier in the line of transit. And this was not done, and nothing like it was done. This defendant never agreed to pay the claim for damages before this suit was brought, but after the case had passed from the court of the justice of the peace it agreed, in order to save costs, that judgment might be entered for the damages, as it would be ultimately liable for them, but it never waived anything in in respect to plaintiff's right to recover a penalty. It is not true, according to the record, in law or in fact, that R. J. Reynolds Co. had no interest in the shipment, and that the consignee at Raeford had none. As we have shown beyond any cavil of doubt, the Farmers Furnishing Company, the consignee at Raeford, had the entire interest in the goods when they were delivered to the carrier at Winston upon an open bill of lading. *Buggy Corp. v. R. R.,* 152 N. C., 119; *Gaskins v. R. R.,* 151 N. C., 18; *Stone v. R. R.,* 144 N. C., 220; *Hunter v. Randolph,* 128 N. C., 91.

Justice Hoke made this plain in *Buggy Corporation v. R. R., supra,* citing some of the above cases, when he said: "The principle indicated has of late been more frequently recognized and applied with us in actions against common carriers under the penalty statutes of the State in defining who is the 'party aggrieved,' designated in most of them as the person who may bring the suit, as in *Stone v. R. R.,* 144 N. C., 220, but they are made to rest on the principle that where a vendor ships goods to a purchaser by a common carrier whose lines afford the usual route and ordinary method of shipment, and on a bill of lading of the kind described, the carrier is considered the agent of the vendee, and on delivery to such carrier the title passes to such vendee, and thereafter,

(247) nothing else appearing, he is the real party interested in the proper performance of the contract. *Hunter v. Randolph,* 128 N. C., 91. And in *Gaskins v. R. R.,* 151 N. C., 18, the doctrine was applied to a case directly involving the right of a consignor to maintain a suit for damages, when it appeared, without more, that the goods had been shipped to a purchaser on an open bill of lading and it was held that the action would not lie."

There is not the slightest evidence in this record that the plaintiff, as the seller of the goods, retained any interest whatever in them, but the entire property in them passed to the consignee, leaving to it only a cause of action for the price. The buyer (consignee) had no legal right to charge the goods back to the seller without his consent, as the latter had sold and delivered them to the carrier, and even with it he could not be made consignee, or restored to the position of consignor,

if he ever held that relation to the shipment. There is no such alchemy known to the law.

We need not discuss the question as to the assignment of the penalty, as it was never assigned, as a fact, and besides if a penalty is generally assignable, this consignee could not assign the one claimed by the plaintiff, as it never had any right to it, not having complied with the law which imposed it.

This case is not like *Horton v. R. R., post,* 383, for there the nominal consignee was the agent of his wife, the real owner, and therefore the "consignee aggrieved," within the words and meaning of the statute, and entitled to receive the goods and sue for the damage to them, as they had been injured. We applied there the law of agency, and, as the plaintiff was acting through another as agent, it was the same as if she had been personally present and acting herself and in her own name (*Qui facit per alium, facit per se*). But here the Farmers Furnishing Company was not agent for plaintiff, but was nominally the consignee and really so, as it was acting for itself, being both legal and beneficial owner of the goods.

The judgment is reversed as to the penalty, and judgment will be entered in the court below in favor of plaintiff for $34, with interest and costs to the date of the tender admitted.

Reversed.

ALLEN, J., concurs in this opinion upon the ground that as the plaintiff, if a consignor, has not filed his claim at the place where the shipment originated, as required by the statute of *consignors,* he cannot recover.

HOKE, J., concurs in concurring opinion of ALLEN, J.

CLARK, C. J., dissenting: This action was begun before a justice of the peace to recover $34 for the loss of ten caddies of tobacco shipped on plaintiff's order from Winston, N. C., 20 October, (248) 1913, by the R. J. Reynolds Tobacco Co. to Farmers Furnishing Co. at Raeford, N. C., which were lost on the line of the defendant's railroad and never delivered. The Farmers Furnishing Co. (who had not paid the plaintiff for the ten boxes) charged back the value of same ($34) to the plaintiff, by whose order the tobacco had been shipped, and released to the plaintiff all claim against the railroad company for the loss.

On 9 December, 1913, the plaintiff filed in writing with defendants claim for the loss, and the same not having been paid, after the lapse of more than six months, began this action on 29 June, 1914, to recover

said sum of $34, with interest from 9 June, 1913, and the penalty of $50 for failure to adjust and pay said claim within the time allowed by law. A jury trial was waived, and the court having found the above facts, rendered judgment for said $34 and interest and for the $50 penalty and costs.

The defendants admitted the loss of the tobacco in transit, that the claim was filed by the plaintiff and failure to pay for ninety days, and in the Superior Court before trial tendered payment of the $34 and interest, but declined to pay the $50 penalty, on the ground that the plaintiff was not entitled to recover the penalty because it was not assignable.

An action for a penalty is *ex contractu, Katzenstein v. R. R.,* 84 N. C., 688, and citations there to in Anno. Ed., and is therefore assignable. *Petty v. Rousseau,* 94 N. C., 355. An action for damages on account of a lost shipment and penalty for unreasonable delay in settlement of the claim can be joined in the same action, for both lie in contract. *Robertson v. R. R.,* 148 N. C., 323; *Jeans v. R. R.,* 164 N. C., 229; Laws 1911, ch. 139.

The plaintiff, however, does not sue as assignee, but as the real consignor and the "party aggrieved," and therefore entitled to maintain this action for the loss and the penalty (which is an incident merely to the loss) under the general statute which requires an action to be brought "by the party in interest." Revisal, 400; *Petty v. Rousseau,* 94 N. C., 355. The plaintiff bought the tobacco from the R. J. Reynolds Co. It was on its order that the shipment was made to the Farmers Furnishing Co., and it was therefore the real consignor, though the R. J. Reynolds Co. appeared in the bill of lading as the nominal consignor. The consignee charged back to the plaintiff the goods which it failed to receive and for which it had not paid, and gave to the plaintiff a statement of that fact. The plaintiff thereupon filed its claim for loss, attaching this statement from the defendant, showing that the plaintiff alone was interested in the loss.

(249) The defendant did not object when the claim for loss was filed, that it was filed at Raeford, instead of at Winston, which was merely a directory matter. If it had made such objection, as in all fairness it should have done, the plaintiff would doubtless have filed the claim for loss at Winston. Not having made the objection, it was waived, else the plaintiff was misled and put to a disadvantage. The defendants did not refuse to pay the loss on any such technical ground that the claim was filed at the wrong place, but tendered payment, and has not excepted on this ground on this trial and the exception is not before us.

It is a matter of common knowledge that railroad companies were often neglectful in adjusting and settling claims for loss of goods in transit, whereby shippers and consignees were much prejudiced. A mere action to recover the loss entailed upon the party injured the expense of counsel fees and the annoyance of litigation. To remedy this public evil the statute which is now Revisal, 2634, was enacted (chapter 330, Laws 1905) for the public benefit. It gives a penalty of $50 against any common carrier failing to adjust and make payment for such losses within ninety days. It having been held that a consignor was not "the party aggrieved" who is entitled to recover damages in such case, *Buggy Corp. v. R. R.*, 152 N. C., 119, the General Assembly thereupon amended the act to provide that the recovery could be made by the consignor "when it shall appear that the consignor was the owner of the shipment." Laws 1911, ch. 139.

If the claim for the penalty had been assigned the assignment would have been valid, *Petty v. Rousseau, supra;* but in fact the statement given to the plaintiff by the consignee was merely to show that the consignee had no interest in the loss and that the plaintiff was "the owner of the shipment," Laws 1911, ch. 139. This case is therefore stronger than *Horton v. R. R., post,* 383, because in that case the nominal consignee had not given any such certificate, brought home to the defendant as here, that the plaintiff there was the real consignee.

In this case it appears, on the facts found by the judge, that the R. J. Reynolds Co., the nominal consignor, had no interest whatever in the shipment; that the nominal consignee had none; that the plaintiff was the actual owner of the shipment and filed its notice with the certificate of the nominal consignee, and that the plaintiff was the real "owner of the shipment." The defendants do not deny that the plaintiff was such owner and that it had neglected for more than the allotted ninety days to adjust the claim by tendering the $34 and interest in open court. If filing the claim at Raeford was a defect material to the plaintiff's rights, it was waived by the defendants not giving the plaintiff notice of said objection, and was further waived in open court by tendering the amount of the loss, and is not now presented by any exception.

The defendants, by admitting by their tender that the plaintiff (250) was the "owner of the shipment" and had suffered the loss claimed, which the defendants had failed to adjust and pay, the penalty of $50 given by the statute was an incident (Laws 1911, ch. 139), and the judgment of *Allen, J.,* to that effect should be affirmed.

The Reynolds Tobacco Co., the nominal consignors, could not sue for loss of the goods, because they were merely the agents of the plaintiff in shipping the goods, and therefore only nominal consignors. The consignee could not sue because it gave a certificate (or release) that the

goods belonged to the plaintiff. The only party who could sue was the plaintiff, who, the defendant admits by tendering payment, was the "owner of the shipment," in the language of the statute. The defendant has not denied that the plaintiff gave notice in due time, and it has not objected that it did not receive such notice because it was filed at the wrong place. The record shows more than six months elapsed before the plaintiff brought suit to recover his loss. The defendant, having dragged the plaintiff through three courts, now is willing to pay for the wrong he has done the plaintiff, after the lapse of two years, the $34, the value of the goods, which ought to have been paid when the loss occurred.

The law requiring the penalty of $50 was to enforce upon these great common carriers the necessity of paying proper attention in a reasonable time to the claims of shippers who sustain losses from the negligence of the railroad companies and to recoup the necessary cost forced on those who have to sue to recover their losses.

To turn the plaintiff off now, after paying counsel for representing them in all the courts, from the lowest to the highest, and to tax the plaintiff with the costs of this appeal on the ground that the notice was filed at the wrong place (to which the defendant then made no objection) is to impose upon the plaintiff a loss far greater than the value of the goods. The statute, instead of being a protection, has proved to be a severe punishment to the plaintiff for the temerity of asking that the courts make the defendant pay for the goods which the defendant has negligently lost and refused to pay for.

A statute ought to be construed according to its intent. The old maxim that a penal statute is to be strictly construed, if it ever had any justification, applies only in criminal cases. It certainly ought not to apply as to a civil remedy in regulation of the railroad companies when, without excuse, they failed to pay losses caused by their negligence in the shipment of goods. In such cases the true maxim is that "A remedial statute should be construed so as to advance the remedy and repress the evil."

Cited: Aydlett v. R. R., 172 N. C. 50 (l); *Phillips v. R. R.*, 172 N. C. 88 (g); *Eagles v. R. R.*, 184 N. C. 70 (f); *Colt v. Kimball*, 190 N. C. 173 (g).

(251)

PAULINE SCHWREN AND HUSBAND v. B. T. FALLS.

(Filed 1 December, 1915.)

Wills—Devises—Interpretation—Fee Simple—Restraint on Alienation.

A conveyance of "the full use and control" of lands, without any limitation as to time, confers a fee-simple title, and a restriction thereon that the grantee shall not dispose of any part of the land unless she become a widow and her necessity requires it, and then only with the consent of the executor, is void as a restraint upon alienation.

APPEAL by plaintiffs from *Justice, J.*, at November Term, 1915, of CLEVELAND.

Rush Strop for plaintiffs.

B. T. Falls for defendant.

CLARK, C. J. This is a controversy submitted without action, and it is agreed that if the plaintiff Pauline Schwren is seized in fee simple of the land and can make a valid conveyance of the same, she is entitled to judgment. The validity of the deed tendered the defendant by the plaintiffs depends upon the following language in the will of J. M. Washburn:

"3. I give and bequeath to my daughter Pauline the place known as the T. B. Washburn place," etc. (describing same) "to have the full use and control of the said land, but not to dispose of any part of said land unless she become a widow and it is necessary for her to dispose of it, or a part of it, for her support, and then only by consent of my executors hereinafter named."

The words "to have the full use and control of said lands," without any limitation as to time, conferred a fee simple. The restriction attempted to be interposed upon alienation, that she should not dispose of any part of the land unless she became a widow and her necessity required it, and then only by consent of the executors of the testator, was void as a restraint upon alienation.

In 13 Cyc., 687, it is said: "If an estate is granted in fee, conditions or restrictions absolutely restraining alienation, when repugnant to the estate created, are void and against public policy," citing, as one of the authorities, *Pritchard v. Bailey,* 113 N. C., 521, which holds that "A provision in a deed that the grantee shall not sell the property during her life is repugnant to the grant, against public policy which prohibits unreasonable restraint upon the right of alienation and void." In *Hardy v. Galloway,* 111 N. C., 519, it was held that a stipulation in the deed prohibiting the vendee from aliening the land without giving the vendors

the privilege of repurchasing was void. To same purport, *Munroe v. Hall,* 97 N. C., 206.

(252) In *Latimer v. Waddell,* 119 N. C., 370, it was held: "A condition annexed to a conveyance in fee simple by deed or will, preventing alienation of the estate by the grantee, within a certain period of time, is void." In this case the English authorities and our own are fully reviewed, citing among others the three cases above quoted. Indeed, since the statute *Quia Emptores,* 18 Edw. I., ch. 1 (1290), which abolished subinfeudation and conferred the right of alienation upon all persons except the King's tenants *in capite,* it has been well settled that restraints upon alienation are invalid. *Wool v. Fleetwood,* 136 N. C., 460, which held that where a will conferred a life estate in realty with a provision that it should not be sold during the life of the life tenant was void, being against public policy.

In 40 Cyc., 1588, it is stated that an attempted restraint upon alienation, either in general terms, or for a particular time or by allowing alienation only to particular persons, or subject to control of others (as here by the executors), is void as to a devise in fee as well as to a deed in fee.

In 8 Ruling Cases, 1113, it is said that since the statute *Quia Emptores* the right of alienation has been considered an inseparable incident to an estate in fee, and restraints thereon are void because against public policy and repugnant to a grant of the fee.

In Gray on Perpetuities, sec. 119, it is held that neither common law nor equity allows restraints on the alienation of property, save in the case of property settled or devised to the separate use of married women. In this State the Constitution permits a restriction upon alienation as to married women by requiring the written consent of the husband to conveyances (but not to wills), though even this is abolished in England and in nearly all the other States of the Union. This restraint does not extend to the husband (except as to the "allotted" homestead, *Dalrymple v. Cole, ante,* 102), who can convey without the consent of his wife, subject only to the contingent right of dower, which is not a restraint on alienation, but in the nature of a contingent lien or mortgage.

We think the devise to the plaintiff, Pauline Schwren, is a devise in fee, and that the attempted restriction forbidding her to dispose of the land, or any part of it, unless she becomes a widow and it is necessary for her to sell it, and then only by the consent of the executor of the testator, is null and void, and that judgment should have been entered for the plaintiff. *Foster v. Lee,* 150 N. C., 688; *Christmas v. Winston,* 152 N. C., 48.

Cited: Brooks v. Griffin, 177 N. C. 9 (f); *Stokes v. Divon,* 182 N. C. 325 (f); *Williams v. Sealy,* 201 N. C. 373 (f); *Barco v. Owens,* 212 N. C. 31 (f); *Burcham v. Burcham,* 219 N. C. 359 (f); *Miller v. Teer,* 220 N. C. 611 (p); *Burney v. Holloway,* 225 N. C. 637 (f).

(253)

GEORGE H. BROWN, ADMINISTRATOR OF FENNER B. SATTERTHWAITE, v. F. C. HARDING, ADMINISTRATOR OF J. J. PERKINS, C. M. BERNARD, AND OTHERS.

(Filed 17 November, 1915.)

1. Judgments—Courts—Records—Signature of Judge.

The statutory requirements that a judgment be signed by the trial judge is merely directory and not mandatory, and when the record entries contain all the essential elements of a judgment it is not necessary to their validity as a judgment that they should have been signed by the judge.

2. Judgments—Motions to Set Aside—Courts—Transcript of Judgment.

Where the transcript of a judgment has been duly docketed in another county than the one in which it was obtained, a motion to set it aside should be made in the court in which it was originally obtained.

3. Venue—Irregularity—Pleas—Waiver.

A plea to the merits by a defendant to an action waives irregularity in the venue thereof. The plea should be made in apt time, and comes too late after judgment.

4. Judgments—Plaintiffs—Beneficial Owners—Payment.

The presumption is that the plaintiff who has obtained a judgment is the owner thereof, with the burden of proof on one alleging to the contrary; and where the plaintiff has obtained two judgments, one in his own name and the other as trustee, he can enforce the latter judgment for the benefit of the true owner, and hold the proceeds for his use and benefit, and the judgment debtor will be protected by payment to the plaintiff of record.

5. Judgments—Transcript—Irregular Judgments — Motions — Collateral Attack.

Objection for defect of parties must be taken by answer or demurrer, or it will be considered as waived, and the matter cannot be questioned collaterally when judgment has been obtained and transcript thereof docketed in another county, and the regularity of the proceedings is sought to be questioned in the latter county.

6. Judgments — Interveners — Beneficial Owners — Payment — Parties — Power of Courts.

In this action to enforce a judgment lien upon land in favor of the plaintiff therein, a stranger to the action intervened, claiming the bene-

ficial interest or ownership of the judgment. Under the circumstances, it is *held*, that it may be expedient to determine the facts as to the beneficial interest to protect the plaintiff from mistake in paying out the funds when received by him; and that the court may make other parties who may have an interest in the judgment.

7. Limitation of Actions—Judgments—Interpretation of Statutes—Prospective Effect.

Where the statute of limitations is pleaded against an execution under a judgment, and it appears that in computing the time it is necessary to cover a period since the operative effect of chapter 111, Laws 1905 (now Revisal, sec. 686), the express provision of the statutes makes its effect prospective and not retrospective, and its bar may not successfully be relied upon. As to whether the sale of the homestead subjects it to the lien of a prior judgment, upon which execution has been issued,
(254) under the provisions of Revisal, sec. 686, *Quære. Farrar v. Harper*, 133 N. C., 71, cited and distinguished.

8. Judgments—Junior Judgments—Liens—Equity—Marshaling.

Where a judgment creditor owns lands subject to a lien of another judgment, and sells a part thereof subject to his junior judgment, the rule of equity requiring the senior judgment debtor to resort first to the lands not embraced by the lien of the junior judgment creditor is subject to the further principle of equity that it must not be done if it involves the senior judgment creditor in litigation or danger of loss; and these rules apply to the purchaser of the remaining portion of the land later sold by the judgment debtor.

9. Same—Interests at Issue.

Where a senior judgment creditor has a lien upon an entire tract of land of the judgment debtor and only a part thereof is subject to a lien of a junior judgment, but both are interested in the determination of facts involved in the further prosecution of the action, the further delay, with its incidental annoyance and expense, does not call for the application of the equitable principle that the senior judgment creditor is not required to proceed first to collect his judgment out of the lands singly charged, when he would thereby be prejudiced, etc.

10. Same—Senior Judgment—Evidence of Payment.

Where a lien by judgment is against the whole tract of land of a judgment creditor and only a part thereof is subject to the lien of a junior judgment creditor, and there is conflicting evidence as to whether the senior judgment has been paid in full, or extinguished by assignment, or whether other parties are therein interested by a partial assignment and who claim the lands under a deed subsequently made by the judgment debtor: *Held*, the right of the senior judgment creditor to enforce his lien by the sale of the entire tract should be first ascertained before he can enforce it.

11. Judgments—Estate—Assignments—Extinguishment.

A lien by judgment on lands does not vest any estate in the judgment creditor, but only the right to have it sold and applied to the satisfaction

of his debt, and a quitclaim deed made by him to a purchaser from the judgment debtor can only have the effect of extinguishing the lien thereon.

12. Same—Husband and Wife—Issues.

In this case it appearing that the husband had assigned to himself a judgment constituting a lien on the land bought by the wife from the judgment creditor, and there is controversy as to whether the husband paid for the assignment of the judgment with his own or his wife's money, an issue as to that question is suggested for the determination of the jury.

13. Same—Release.

Where the wife who has purchased lands subject to a lien of an outstanding judgment has been released therefrom, a purchase and assignment of the judgment by the husband for the benefit of the wife operates only as confirming the release to the wife, unless it was an independent transaction based upon an independent consideration.

14. Equity—Lands—Conflicting Liens—Clouds on Title—Fair Sale.

Where the sale of lands is sought in a suit, equity will remove clouds upon the title thereof, so that the lands may bring a fair price at the sale; and where conflicting liens between senior and junior judgment creditors and the rights of the purchasers subject thereto are in- (255) volved, the rights of the parties in the distribution of the proceeds of the sale will be adjudicated.

15. Equity—Liens Assigned—Subrogation.

Where a senior judgment creditor has a lien under his judgment on the entire lands of his judgment creditor, and a part thereof only is subject to the lien of a junior judgment, the junior judgment creditor may pay off the prior lienor and have the judgment assigned to him, and thus become subrogated to his rights; or if the lands have been sold under the prior judgment lien, by compulsion of legal process, he has right of subrogation in the proceeds, as the land occupies, in the contemplation of equity, the position of surety to the debt.

16. Equity — Judgments — Liens—Deeds and Conveyances—Purchasers—Subrogation.

Where the owner of land subject to a lien by judgment sells and conveys a part thereof and subsequently the remaining part, it was the duty of such owner to pay off the judgment debt before making the second conveyance in exoneration of the land sold to the second purchaser, or forfeit the remaining part of the land to the extent necessary to do so; and as between the second purchaser and the judgment creditor the former has the equity to compel the latter to subject the land first conveyed to the satisfaction of his lien.

17. Appeal and Error—Several Parties—Nonsuit—Erroneous as to One.

Where a judgment as of nonsuit upon the evidence has erroneously been granted to the prejudice of several of the parties, but appealed from by only one of them, it will be set aside on appeal as to all.

18. Appeal and Error—Costs.

In this case the plaintiff's recovery was resisted by both defendants, denying the validity of the plaintiff's judgment, sought by him to be enforced, and a nonsuit in favor of one of the defendants having been set aside, the costs on appeal will be equally paid by both.

BROWN, J., did not sit on the hearing of this case.

APPEAL by defendant from *Connor, J.*, at March Term, 1915, of PITT.

Civil action, brought by George H. Brown, administrator of F. B. Satterthwaite, to enforce two certain judgment liens against the land set apart to J. J. Perkins as a homestead; one part of which was sold by J. J. Perkins to Lucy G. Bernard, from whom it descended, to the defendants Bernards, and the remaining part was afterwards sold by the homesteader to his son, W. W. Perkins.

At the November Term, 1870 (Nov. 11), of Beaufort Superior Court, judgment was rendered in the name of F. B. Satterthwaite, endorsee, against J. J. Perkins, on a note for $527.94, bearing date 2 November, 1869, which judgment was transcripted and duly docketed in the Superior Court of Pitt County, where the land is situated, on 17 February, 1871, and was properly cross-indexed. That at the same term of the Superior Court another judgment was recovered in the case of
(256) C. S. Parsons & Sons, to the use of F. B. Satterthwaite v. J. J. Perkins, on a note for $527.95, dated 2 November, 1869, with interest from 5 March, 1870; said judgment, on 16 February, 1870, was transcripted from Beaufort Superior Court to Pitt Superior Court and regularly docketed on the judgment docket of Pitt Superior Court, and properly cross-indexed.

At the August Term, 1913, of Pitt Superior Court, Edward Parsons and Henry C. Parsons filed in this cause an affidavit, setting forth that they were the survivors of the late firm of C. S. Parsons & Sons, and as such the equitable owners of the two judgments declared on in this action, and entitled to the proceeds collected, and that the said judgments were not the property of F. B. Satterthwaite, who, at the time of taking these judgments, was in possession of the two notes upon which they were rendered, as attorney for the collection thereof; and that nothing has been paid on said notes or judgments, but that the same are still due and owing to the late firm of C. S. Parsons & Sons, the equitable owners thereof, upon which they were permitted to intervene and be made parties plaintiff to set up the rights of the said C. S. Parsons & Sons to the proceeds realized from the collection of said judgments.

Upon the two judgments referred to, which were taken and docketed in Beaufort Superior Court, transcripted, docketed and cross-indexed

on the judgment docket of Pitt Superior Court, executions were regularly issued, and the homestead of the judgment debtor, J. J. Perkins, was duly allotted to him, which included Lot No. 33, in the town of Greenville. The homestead returns were regularly recorded in the office of the register of deeds, 15 March, 1871.

At the Spring Term, 1870, of Pitt Superior Court, a judgment was rendered in favor of W. M. B. Brown as administrator of Richard Short v. J. J. Perkins, for the sum of $1,788.90, with interest on $1,650.90 from 1 April, 1870, and docketed in said month in Pitt Superior Court. A homestead was duly alloted under an execution issued upon this judgment, to the defendant, which embraced said Lot No. 33.

On 24 July, 1893, J. J. Perkins, for the consideration of $1,000, conveyed the land described in the complaint, it being a part of his homestead and of Lot No. 33, to Lucy G. Bernard, wife of C. M. Bernard, and mother of the other Bernards, who are defendants in this action. She died before the bringing of this suit. Afterwards, on 12 November, 1903, J. J. Perkins, the judgment debtor and homesteader, conveyed the remainder of Lot No. 33 to his son, W. W. Perkins. The deeds were all duly registered. J. J. Perkins died in May, 1911. F. B. Satterthwaite died in 1875, and plaintiff, George H. Brown, qualified as his administrator in 1875, and filed his final account in 1876. It is alleged, and there is proof to show it, that the judgment of W. M. B. Brown, (257) admr., v. J. J. Perkins, was assigned by L. V. Morrill, administrator, to R. A. Tyson, and by the latter to Mrs. A. C. Perkins, wife of the judgment debtor, J. J. Perkins. She died, leaving a will in which she devised and bequeathed all of her estate to her husband, J. J. Perkins. After her death R. A. Tyson assigned the judgment, at the request of the judgment debtor, J. J. Perkins, to the latter's son, W. W. Perkins, who is dead, his administrator, heirs at law and distributees being parties to this suit, as defendants.

Before the judgment in favor of W. M. B. Brown, administrator, was assigned by R. A. Tyson to Mrs. J. J. Perkins he executed to Mrs. Lucy G. Bernard the following instrument:

For and in consideration of the sum of $600 I do hereby grant, bargain, sell and release and remise and forever quitclaim unto Lucy G. Bernard, her heirs and assigns forever, a certain piece or lot of land situate in the town of Greenville, known as a part of Lot No. 33 in said town, which has this day been conveyed by J. J. Perkins to the said Lucy G. Bernard, and the same is relieved and discharged from any lien on account of a certain judgment recorded in Pitt Superior Court of W. M. B. Brown, administrator of Richard Short, transferred to L. V. Morrill, and by said Morrill assigned to me, and on record in Judgment Docket No. 1, page 193.

In witness whereof I hereby set my hand and seal, this 24 July, 1893.

R. A. Tyson.

R. A. Tyson testified as follows: "The judgment of W. M. B. Brown, administrator of Richard Short, v. J. J. Perkins, was assigned to me by L. V. Morrill. I transferred it to Mrs. A. C. Perkins, wife of J. J. Perkins. I made a transfer of the judgment on a little strip of paper. Mr. E. A. Moye was clerk; I think he pasted it on there. Mr. Moye wrote it out; I signed it and left it with Mr. Moye; saw him stick it on the book and never saw it any more until Mr. J. J. Perkins came to me and said he wanted the transfer made again, as it had gotten off of that book; that he wanted the transfer again; that he had paid me for the judgment and there was nothing against it, and he wanted it transferred to his son. Mrs. Perkins was dead when I transferred to his son, that is, when I transferred it the last time. It was all paid when I transferred it to Mrs. Perkins. Mr. Bernard paid me, I think, $600; I do not remember exactly. I think that was transferred the same way, and I was to give him $600 interest in the judgment. I think that was transferred the same way. It was written on a little piece of paper and stuck on the book. I do not know what became of that piece of paper; it was never brought back to me. Mr. Perkins said it was lost and gone (258) and he wanted me to retransfer. I don't know whether the paper with that I transferred to Mrs. Perkins was on the record when I made the transfer to W. W. Perkins. It was like it is now. I signed the transfer on a little piece of white paper. Mr. E. A. Moye, clerk of the Superior Court, was present. He is dead. Mr. J. J. Perkins was also present; he is also dead. Two or three years after that J. J. Perkins came to me and asked me about it. I have not told that I wrote it on a piece of paper and handed it to Mrs. Perkins. I was friendly with W. W. Perkins. Mr. J. W. Perkins married W. W. Perkins's widow. I am not friendly with him. I married J. J. Perkins's oldest daughter. J. W. Perkins and myself were on friendly terms at the time of this transaction; disagreement has happened recently."

This action was commenced 8 May, 1913.

Defendant tendered these additional issues:

7. Did Lucy G. Bernard pay to R. A. Tyson, owner, as assignee of the judgment of W. M. B. Brown, administrator of Richard Short, v. J. J. Perkins, six hundred dollars on said judgment; and did said Tyson assign to Lucy G. Bernard an interest in said judgment to the extent of said six hundred dollars at the time of the sale of the land by J. J. Perkins to said Lucy G. Bernard?

8. Did R. A. Tyson assign to Allie C. Perkins, wife of J. J. Perkins, the remaining part of said judgment?

9. Did Allie C. Perkins, wife of J. J. Perkins, bequeath by will her interest in said judgment to J. J. Perkins?

10. Was the assignment, as it appears upon the judgment docket of said judgment of W. M. B. Brown, administrator of Richard Short, v. J. J. Perkins, to W. W. Perkins, made after the death of Allie C. Perkins?

11. After the payment and assignment to Lucy G. Bernard of six hundred dollars in the judgment of Brown, administrator, as aforesaid, v. J. J. Perkins, did said J. J. Perkins pay off the balance of said judgment before the assignment to W. W. Perkins?

The jury returned the following verdict:

1. Did F. B. Satterthwaite, endorsee, obtain a judgment against J. J. Perkins in Beaufort Superior Court for $527.94 and costs, and was said judgment duly docketed in said court 11 November, 1870, and did C. S. Parsons to the use of F. B. Satterthwaite obtain one other judgment for $527.95 and costs against J. J. Perkins, and was said judgment duly docketed in said court 22 November, 1870? Answer: Yes.

2. If so, were said judgments duly transcripted and docketed in the Superior Court of Pitt County, as alleged in the complaint, on 18 February, 1871? Answer: Yes.

3. Was the homestead of the said J. J. Perkins duly allotted (259) and assigned to him on 16 March, 1871, as alleged in the complaint and answer, and did said allotment include the lands in controversy in this action as his homestead? Answer: Yes.

4. Is the lien of said judgments still subsisting on the lands set apart to J. J. Perkins as a homestead? Answer: Yes.

5. Is the action of the plaintiff to foreclose said liens barred by the statute of limitations? Answer: No.

6. Are C. S. Parson & Sons the equitable owners of the two judgments set out and described in the complaint and declared on in this action, to wit, F. B. Satterthwaite, endorsee, v. J. J. Perkins, and C. S. Parsons & Sons to the use of F. B. Satterthwaite against J. J. Perkins? Answer: Yes.

The court adjudged that the land conveyed to Lucy G. Bernard be sold by the commissioner, to pay the judgments held by plaintiffs and amounting to $3,873.16, on the first day of the term, and the costs and also the expenses of sale, and further directed the application of the proceeds of sale and a report by the commissioner to the court. The Bernards excepted, appealed and assigned errors as follows:

1. The appellants moved to set aside the proceedings in Beaufort County in both cases against J. J. Perkins for irregularity, on the ground that Parsons & Sons were not residents of this State and J. J. Perkins was a resident of Pitt County, and suit should have been

brought in Pitt County. His Honor denied the motion and appellants excepted.

2. The plaintiffs offered the records of Beaufort County and the transcrips of Pitt County. The appellants objected on the ground that the records were mere fragments and that no judgment had ever been rendered or drawn up and recorded. This same objection was made to each and every one of such records. These objections were all overruled and appellants excepted.

3. At close of plaintiff's evidence the defendants Bernard moved for judgment as of nonsuit on the following grounds: (a) For that the records do not show that there was ever any judgment rendered in either action, and that the docketing of what is on record is not sufficient to constitute a lien on the land in controversy. (b) That there is no evidence to show that the plaintiffs Henry C. Parsons and Edward Parsons are now or ever were in any way connected with the firm of C. S. Parsons & Sons. (c) That plaintiffs' claim, if any they ever had, is barred by the statute of limitations.

4. The defendants Bernard allege in the pleadings that if there is any subsisting lien on the lands formerly owned by J. J. Perkins that they are entitled to subrogation as to the six hundred dollars (260) paid on the W. M. B. Brown judgment, which was the first lien on all the land, and also that their ancestor having purchased in 1893, and the lands now in possession of Virginia H., V. E. and Harry W. Perkins having been conveyed in 1903, this land must first be subjected to sale to satisfy plaintiffs' claim. This claim was denied by the court.

5. At the close of all the evidence the defendants Virginia H., V. E. and Harry W. Perkins moved for judgment as of nonsuit. Motion allowed. Appellants excepted.

6. At the close of all the evidence the court refused their motion for nonsuit.

7. The court refused to submit the additional issues tendered by the appellants, as set out in the record, and defendants excepted.

8. Under the charge of the court the jury answered all the issues submitted in favor of the plaintiffs, and the appellants excepted.

9. Appellants moved for a new trial for errors set out in record. Overruled, and the appellants excepted.

10. When the judgment was tendered for the signature of the judge, and before the signing of same, the appellants moved to set aside the verdict and for a new trial, on the ground that there are not sufficient facts found on which to render judgment, the records all showing that George H. Brown, as administrator of Satterthwaite, has no interest, right, or title in and to said judgments, or either of them, and there is

no proof and no finding of fact that the plaintiffs Henry C. Parsons and Edward Parsons are now or ever were members of or in any way connected with the old firm of C. S. Parsons & Sons, which they allege was dissolved by the death of some of its members many years ago. The motion was overruled and exception taken. Appeal by defendants.

S. J. Everett for plaintiffs.

Harry Skinner, L. G. Cooper for interveners, C. S. Parsons & Sons.

N. Y. Gulley, A. C. Bernard, D. M. Clark for defendants Bernard.

W. F. Evans for defendants Perkins et al.

WALKER, J., after stating the case: This action was brought by the plaintiff against the administrator of J. J. Perkins, the judgment debtor, and other parties interested in the controversy, to enforce the lien of the judgments recovered by him in Beaufort Superior Court, and, in furtherance of that purpose, to have a sale of the land which is covered by the homestead, and the proceeds applied to the payment of the said judgments, the homesteader having died, and the right to subject the land to the satisfaction of the debts evidenced by the judgments having accrued to him, the plaintiff.

The first objection to plaintiff's recovery is that the judgments were not duly rendered in Beaufort Superior Court. The record entry contains all the essential elements of a judgment, and it was not (261) necessary to the validity of the judgments that they should have been signed by the judge. It was held in *Bond v. Wool,* 113 N. C., 20, that while it is more regular, and for many reasons the better course, that a judgment should be signed by the judge, the provision of the statute is not mandatory, and, consequently, an entry "Judgment as per transcript filed," is sufficient to constitute a judgment. It has been repeatedly held that the requirement as to signing a judgment is merely directory. *Rollins v. Henry,* 78 N. C., 342; *Keener v. Goodson,* 89 N. C., 273; *Summer v. Sessoms,* 94 N. C., 371; *Ferrell v. Hales,* 119 N. C., 212.

The motion to set aside the judgments for irregularity came too late, and should have been made in the Superior Court of Beaufort County, where they were originally rendered, but the ground of the motion, that the actions should have been brought in Pitt County instead of Beaufort County, was insufficient, as an objection to the venue should be made before judgment, for it should be taken in apt time, and if the defendant pleads to the merits he will be deemed to have waived it. *McMinn v. Hamilton,* 77 N. C., 300; *Lafoon v. Shearin,* 91 N. C., 370; *Morgan v. Bank,* 93 N. C., 352; Clark's Code (3 Ed.), sec. 195, p. 149, and note.

The defendant argued that the entries on the records were mere fragments, and too uncertain to be considered as solemn judgments of the court, but we think otherwise. We have discussed this question somewhat already, but we may add that if *Rollins v. Henry, supra,* is examined, it will be found that the judgment in that case consisted merely of memoranda and was not as definite and complete as those in question here, and it was held to be valid and sufficient; and in *Bond v. Wool, supra,* the entry, "Judgment as per transcript filed," was considered as sufficient to show a regular judgment of the court.

We think there was some evidence that Henry C. and Edward Parsons had the beneficial interest in the judgment, but if there was not such evidence it cannot avail the defendants, as the judgments were taken in the name of Mr. Satterthwaite, and, nothing else appearing, he was the legal owner of the one and the beneficial owner of the other, as the record now shows, at the time of his death, and his administrator can have them enforced or collected for the benefit of the true owner. The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof must be on the one who alleges the contrary. If Mr. Satterthwaite was not the beneficial owner of one of the judgments he was, as nominal plaintiff, at least a trustee, as he recovered the judgment in his own name, and having the legal title, he would hold it for the use and benefit of the real owner. These are matters to be settled between George H. Brown, administrator, and the real owners
(262) of the judgment, and do not concern the defendant, as they will be protected by payment to the plaintiff of record. Whether he had a right, in law, to sue on the notes, as he did, cannot be questioned collaterally, at this stage of the proceedings, as an objection for defect of parties must be taken by answer or demurrer or it will be considered as waived. Revisal, secs. 475, 476, 477 and 478; *Usry v. Suit,* 91 N. C., 406; *Kornegay v. Steamboat Co.,* 107 N. C., 115, and cases cited at p. 117. It is not necessary that the Parsons should be parties, so far as the defendants are concerned, as the latter may safely pay to the plaintiff on the record, as we have shown, and to fortify this further, we now cite *Newsom v. Russell,* 77 N. C., 277: "It is not the duty of the maker of the note to see to the application of the money, and it is even less his duty to fight the battle of the creditors of the bankrupt. What interest is it to him if he is absolved from further liability by payment of his debt upon a judgment regularly obtained against him?" But it may be expedient to determine the fact as to the beneficial interest of the Parsons, so that the plaintiff may know how to pay out the fund when received by him and to protect him against any mistake in that regard. Plaintiff has filed a petition for a *certiorari* to correct the record, so as to show that it was admitted at the trial that the Parsons

were the beneficial owners of the judgments, with a letter from the presiding judge to that effect, but we do not deem it necessary to act upon it at all, as we have decided not to disturb the finding on the sixth issue, and it does not concern the defendant if the Parsons are not parties. The court may make other parties as defendants in this action, if the issues to be submitted require it, because of their interest therein. The motion of the appellants for judgment of nonsuit was properly overruled. The question involved in the nonsuit of plaintiff on the motion of Virginia H. and Harry W. Perkins will be hereinafter considered.

This leaves the three principal questions in the case for consideration: First, whether the judgments are barred by the statute of limitations; second, whether the Bernards are entitled to have the Perkins' part of the land (lot No. 33) sold, it being the last part conveyed by J. J. Perkins, before their land is resorted to by the plaintiff; and, third, whether the court should have submitted to the jury the issues tendered by the Bernards.

As to the statute of limitations, we do not think it barred the plaintiff's right to proceed in the collection of the judgments by suit. Mr. Gulley has stated his contention in behalf of the Bernards very frankly and very clearly. We quote from the supplemental brief: "The record shows that the so-called judgments were docketed 11 November, 1870, the homestead was allotted on 18 February, 1871, or 3 months and 7 days afterwards. The statute of limitations was not suspended from 1 November, 1883, to 11 March, 1885, making 1 year 4 months and 10 days to be added. The present statute, Revisal, sec. 686, was passed (263) 6 February, 1905, and this action was begun 15 August, 1913, making 8 years 6 months and 9 days between the two dates. These three periods, when added together, make 10 years 1 month and 26 days, showing that the action is unquestionably barred."

By the Laws of 1869-'70, ch. 121, ratified 25 March, 1870 (Battle's Rev., ch. 55, sec. 26), what is called "the reversionary interest" in a homestead was forbidden to be sold, and it was further provided that the statute of limitations should not run against any debt owing by the owner of the homestead affected by the act during the existence of his interest in the homestead. This act was construed in *McDonald v. Dickson,* 85 N. C., 248. It was not incorporated in the Code of 1883, which became effective on 1 November of that year, and it was held in *Cobb v. Halyburton,* 92 N. C., 652, 654, that it ceased to operate from that day and the statute of limitations again began to run, and it continued to do so until 11 March, 1885 (Laws 1885, ch. 359), when another act was passed with this provision: "The statute of limitations shall not run against any *payment* owing by the owner of a homestead or homestead interest during the existence of such homestead or homestead

interest, whether the same has been or shall hereafter be allowed, assigned and set apart under execution or otherwise." The word "payment" used in this statute, which from the context it was reasonably inferred meant "judgment," and was by some misprision of the copyist substituted for the latter word, produced some uncertainty in regard to the matter until 24 January, 1887, when the Legislature corrected the phraseology by substituting the words "judgment against" for the other words, "payment owing by," so that it would read generally that the statute of limitations should not during the existence of the homestead affect any judgment against the owner thereof. The acts of 1885 and 1887 now constitute a part of Revisal, sec. 685.

We need not decide whether the Bernards are entitled in the computation of time elapsed, when the statute of limitations was operative, to the first period claimed by them, that is, the 3 months and 7 days between the date of docketing the plaintiffs' two judgments and the date when the action was commenced, nor need we consider the other claim of 1 year 4 months and 10 days from 1 November, 1883, to 11 March, 1885, as we are of the opinion that they are not entitled to count the period last claimed, that is, 8 years 6 months and 9 days, our construction of the act of 6 February, 1905 (Laws of 1905, ch. 111), as brought forward in the Revisal, sec. 686, being quite different from the one relied on by learned counsel. That section provides: "The allotted homestead shall be exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the Constitution, Article X, sec. 8, the exemp-
(264) tion thereof ceases as to liens attaching prior to the conveyance. The homestead right being indestructible, the homesteader who has conveyed his allotted homestead can have another allotted, and as often as may be necessary: *Provided,* this shall not have any retroactive effect."

The Bernards insisted that under section 686 of the Revisal, if the owner of the homestead, against whom a judgment has been taken, conveys it, he thereby subjects it to sale under execution issued upon the judgment, and that, as the creditor can thus proceed against him, the effect of the section is to put the statute of limitations in motion again as to homesteads which have been conveyed by their owners. We need not say how this is, or give any precise opinion upon the meaning of that statute, as there is a proviso to it which prevents it from being retroactive in its operation. In our case the judgments were rendered, and the homestead allotted and conveyed by its owner long before the statute (Revisal, sec. 686) was enacted. It would, therefore, be made to operate retroactively if applied to the facts in this record. It was thought just and right that it should not do so, as it might otherwise be

open to very serious objection. At any rate, the Legislature has plainly said it shall have no such effect, but a prospective one alone, and this is a sufficient reason for the law. In *Davenport v. Fleming,* 154 N. C., 291, the Court considered the act and said, by *Justice Hoke,* in regard to this feature of it: "A construction of section 686 of the Revisal does not seem to be involved in this appeal, for the section itself contains the provision that the same shall have no retroactive effect, and the determinative facts all transpired before the section was enacted. Chapter 3, sec. 3, Laws 1905." And in *Crouch v. Crouch,* 160 N. C., 447, the Court, by the *Chief Justice,* said: "It is true that under the act of 1905 ch. 111, now Rev., 686, the homestead exemption ceased as to this tract of land when the homesteader conveyed it to Abernathy. But the act specifically provides that it shall not have any retroactive effect; therefore the land did not become subject to plaintiff's execution till 1905, and the defendant has neither held the land seven years under color of title nor is the lien of the judgment barred by the ten years statute of limitations." We therefore conclude on this question that the last claim of the Bernards cannot be allowed, and the eight years six months and nine days counted as a part of the time during which the statute of limitations was running, and, this being so, it follows that the judgments are not barred by it. *Farrar v. Harper,* 133 N. C., 71, does not apply. It decided very different questions: first, as to whether the act of 1885, ch. 359, suspended the running of the statute of limitations until there had been an actual allotment of the homestead; and, second, as to whether the act of 1901, ch. 612, extending the time two years for allotting homesteads, prevented the running of the statute against a judgment which was already more than ten years old. We an- (265) swered both questions in the negative.

The next inquiry is, whether the Bernards are entitled to have the part of lot No. 33, which was conveyed to W. W. Perkins by J. J. Perkins, sold under the decree of the court to satisfy plaintiff's judgments before their part of the said lot is sold for that purpose, as the same was conveyed to them by the judgment debtor, J. J. Perkins, before he conveyed the remainder thereof to W. W. Perkins.

The doctrine seems to be established that where there is a lien by judgment resting upon land, part of which is sold by the debtor, the remaining portion will be sold before resorting to the land first sold to satisfy the debt, and the rule extends to a purchaser of the remaining land from the judgment debtor as well. The rule, with its exception or qualification, is thus stated in 23 Cyc., 1392 and 1393: "Where part of the land subject to the lien of a judgment has been sold, equity will require the judgment creditor, seeking to enforce his lien, to proceed first against that portion remaining unsold provided this can be done

without injustice to him and without involving him in litigation or danger of loss. So, also, where part of the land has been mortgaged, the judgment creditor must first have recourse to that portion remaining in the hands of the debtors; and where part of the land has been mortgaged and part aliened in fee the judgment creditor must first proceed to sell the debtor's equity of redemption in the mortgaged lands before coming upon the property conveyed in fee. Where lands subject to the lien of a judgment have been sold or encumbered by the owner at different times to different purchasers there is no contribution among the successive purchasers, but the various tracts are liable to the satisfaction of the judgment in the inverse order of their alienation or encumbrance, the land last sold being first chargeable, unless the judgment creditor breaks the order of liability by a voluntary release of one or more of the tracts."

It has been recognized by this Court in *Jackson v. Sloan,* 76 N. C., 306, where *Justice Bynum* said: "The rule of equity is, that when one creditor can restort to two funds for the satisfaction of his debt, and another to one only of the funds, the former shall first resort to the fund upon which the latter has no claim, as that by this means of distribution both may be paid. And it is an analogous priciple of equity that where a debtor whose lands are encumbered by a judgment lien sells one portion of it, the creditor who has a lien upon that which is sold and upon that which is unsold shall be compelled to take his satisfaction out of the undisposed of land, so that thus the creditor and the purchaser both may be saved. *Rollins v. Thompson,* 21 Miss., 521; *Russell v. Howard,* 2 McL., 489; *Alston v. Munford,* 1 Brock., 267; Hermon on Ex., 224. But this, however, is never done when it (266) trenches on the rights or operates to the prejudice of the party entitled to go upon both funds. *Meech v. Allen,* 17 N. Y., 300; *United States v. Duncan,* 4 McL., 607; *McCulloch v. Dashiell,* 1 Harris & Gill, 96." See, also, *Francis v. Herren,* 101 N. C., 497; 2 Story's Eq. Jur., sec 1233 a; *Clark v. Wright,* 24 S. C., 526.

This equity bears a close resemblance to the doctrine of marshaling, "which grows out of the principle that a party having two funds to satisfy his demands shall not, by his election, disappoint a party who has only one fund. If A, for example, holds a first mortgage against only one of these parcels, natural justice would seem to require that A should not resort in the first instance to the parcel covered by B's mortgage, but should endeavor to collect his debt from the lot charged with his encumbrance alone, and resort to the portion covered by B's mortgage only for the purpose of making up any deficiency." Bispham's Pr. of Equity, sec. 340. But, as has been observed, this equity is never enforced against the creditor when he will, in any substantial way, be

prejudiced by it, and if it were not for the other questions involved we would hold that the plaintiffs in the Satterthwaite judgment would be delayed or embarrassed in the collection of his debt and put to extra cost and expense, and the doctrine, therefore, would not apply; but there are other matters to be determined in which he has an interest and the other parties a very vital one. It is asserted that the judgment in favor of W. M. B. Brown, administrator of Richard Short, has never been paid, but is still due and owing, and is a charge upon the lands of J. J. Perkins or his assignees, while this is denied on the other hand. There is also controversy as to whether this judgment was assigned to Perkins's wife, and afterwards given to him in her will, thereby being extinguished, and also a contention by W. W. Perkins, administrator, and heirs, that it was assigned to him. C. M. Bernard also claims that six hundred dollars of this judgment was assigned to him. As to this claim of C. M. Bernard, it appears that if there was such an assignment it was made for the purpose of protecting the land conveyed to Bernard's wife by J. J. Perkins from any lien of the judgment of W. M. B. Brown, administrator of Richard Short, and as we hold that the land so conveyed is discharged from any such lien, the question as to this assignment becomes immaterial. The paper-writing, dated 24 July, 1893, and entitled a "release," which was given by R. A. Tyson to Mrs. Bernard, quitclaims to her the parcel of land conveyed to her by J. J. Perkins. But R. A. Tyson had no estate or interest in the land, being merely a judgment creditor, having nothing more than a lien thereon. It has been held in this Court that a judgment does not vest any estate or interest in the land upon which it is a lien, but only gives to the plaintiff in it the right to have it applied to the satisfaction of his debt. *Bruce v. Nicholson,* 109 N. C., 202; *Baruch v. Long,* 117 N. C., 509 *Bryan v. Dunn,* 120 N. C., 36; *Dail v. Freeman,* 92 N. C., 357; *Murchi-* (267) *son v. Williams,* 71 N. C., 135. It would seem, therefore, necessarily to follow that it was intended, as the legal effect of the instrument, that the land should be released and exonerated from the judgment lien, as this is all that he, R. A. Tyson, could do, and we so hold upon the facts as they now appear.

But the other questions embodied in the issues tendered by the Bernards must be submitted to the jury in order that the facts may be found as to whether the said judgment was paid by J. J. Perkins, and, if not, whether he assigned it to his wife and in her will she gave it to him, which, of course, would extinguish it, as the two antagonistic rights of creditor and debtor had merged in one and the same person. The issues might be a little more clearly drawn, but we leave this with the court below, and will not anticipate what the evidence may be by any attempt to formulate them ourselves. We will suggest, though, that an

issue be submitted as to whether J. J. Perkins paid the judgment out of his own money before the time it is alleged that he assigned it to his wife. As to issue No. 7, tendered by the Bernards, if Mrs. Bernard paid the full consideration of $1,000 for the land conveyed to her by J. J. Perkins, and it is released, as we hold, from the lien of the judgment, we do not see how an assignment of $600 of the judgment to C. M. Bernard can be sustained, other than as confirming the release to his wife, unless it was an independent transaction based upon a different consideration. But it may be necessary to settle this matter by a finding of the jury unless the parties can agree as to the true nature of the transaction.

A court always seeks to secure the best price in the sale of land under its decree, and, therefore, it is necessary to determine the status of the W. M. B. Brown judgment, not only to settle all disputed matters so that the land can be sold to determine how the proceeds of sale shall be distributed, as that judgment is older in date, and, therefore, is prior in lien to the other two, but in order to remove the cloud from the title and get a sound price for the land. As the junior judgment creditor has an interest in the settlement of these matters there will be no additional delay to him if we direct that the Perkins part of the lot be first sold, before there is a sale of the Bernard lot, as these questions must be determined before any sale of the land can be had, and recovery of his debt will not be jeopardized, nor will be in the least embarrassed thereby.

We therefore conclude: First, that the plaintiff holds valid judgments against J. J. Perkins, which are liens upon the lands in question (lot No. 33). Second, that said judgments are not barred by the statute of limitations, and that plaintiff is entitled to have them sold for their satisfaction. Third, that if the judgments are not paid within a time to be fixed by the court, and it therefore becomes necessary to sell the (268) land, that part of it which was conveyed to W. W. Perkins shall be first sold before the part thereof which was conveyed to Mrs. Lucy G. Bernard is sold to pay the indebtedness.

This conclusion is practically the same that would be reached had we affirmed the ruling of the court that the Bernard land alone be sold, for in such an event the Bernards would be entitled to pay the amount of the debt to the plaintiff herein and have the judgment assigned for their use and benefit, in which case they would be subrogated, by virtue of the assignment, to the rights of the plaintiff as against the Perkins interest in the land, or if they had been compelled to pay it by a sale of their land, or by compulsion of legal process or a decree of court, which is substantially the same thing, they would be subrogated in equity to the rights of the plaintiff, as their land occupies, in contemplation of equity, the position of surety to the debt, the Perkins land being the principal,

and the liability of the Bernard land, as between it and the Perkins land, being secondary, and the creditor being satisfied and out of the way, thus giving full play to the enforcement of this plain equity as between the two parcels of land upon which the lien of the judgment rests.

"The equity of subrogation springs naturally out of the two equities just considered, of contribution and exoneration, and is, in fact, one of the means by which those equities are enforced. Subrogation is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor and by the use of which the party paying may thus be made whole. This equity may be used to enforce the equity of exoneration as against the principal debtor, or of contribution as against others who are in the same rank. This equity of subrogation is one eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected." Bispham's Equity (6 Ed.), secs. 335 and 336.

The duty rested upon the principal debtor, J. J. Perkins, before he conveyed to W. W. Perkins, to pay off the debt in exoneration of that part of the land he first sold to Mrs. Bernard, or forfeit the remaining portion of the land to the extent necessary to do so, and when he conveyed that part to W. W. Perkins the latter took it subject to the same equity. *Polk v. Gallant,* 22 N. C., 395; *Winborne v. Gorrell,* 38 N. C., 117, *Duran v. Crowell,* 97 N. C., 373. So it results that, whichever way we view it, the right to have the Perkins land sold first before theirs was subjected to the payment of the debt belonged to the Bernards.

It was erroneous to grant the nonsuit against the plaintiff in favor of the Perkins land. It is true the plaintiff did not except, but the Bernards did, and they are entitled to have it set aside, in order (269) to have their equity fully administered, and this will be done.

The case will proceed further in the Superior Court according to this opinion, and as both the Bernards and Perkinses resisted plaintiff's recovery by denying the validity of the judgments, and as the nonsuit obtained by the Perkinses has been set aside, the costs of this Court will be divided equally between those defendants, the Bernards to pay one-half and the Perkinses the other half.

Error.

JUSTICE BROWN did not sit during the argument of this case and took no part in the decision.

Cited: Brown v. Harding, 171 N. C. 686, Petition to rehear denied; *Marler v. Golden,* 172 N. C. 825 (4f); *Casket Co. v. Wheeler,* 182 N. C. 462 (4f); *Clark v. Homes,* 189 N. C. 710 (3f); *Eaton v. Doub,* 190 N. C. 17 (5f); *Trust Co. v. Godwin,* 190 N. C. 517 (8g); *Farrow v. Ins. Co.,* 192 N. C. 149 (11f); *Everett v. Staton,* 192 N. C. 224 (15f); *Causey v. Morris,* 195 N. C. 536 (3g); *McLamb v. Adams,* 222 N. C. 715 (4f); *Beam v. Wright,* 224 N. C. 684 (15f); *Lee v. Rhodes,* 227 N. C. 241 (11).

ISAIAH JENKINS v. W. J. LONG ET AL., TRADING AS SULLIVAN, LONG & HAGERTY, ET AL.

1. Master and Servant—Instructions—Safe Place to Work—Evidence—Jury—Presumptive Knowledge.

Where damages are sought in an action for the negligent caving in of a ditch 8 feet deep by 2½ feet wide, in which the plaintiff, defendant's employee, was at work at the time, by reason of not having left bulkheads to protect the plaintiff, testimony that a shallow ditch would not require bulkheads or bracing, but if deep enough to reach a man's head in rotten ground or liable to cave it would require them for safety, does not constitute reversible error as an expression of opinion, for men of ordinary intelligence are presumed to know this without testimony thereof.

2. Master and Servant—Negligence—Safe Place to Work—Evidence—Notice of Danger.

Where negligence alleged in an action for damages is the failure of the defendant to have provided bulkheads or braces in a ditch where his employee, the plaintiff, was required to work, and in consequence the ditch caved in and injured him, testimony of a witness that he told the defendant's superintendent in charge of the work on the day of the injury, but before its occurrence, that the ditch was dangerous without the bulkheads, is competent as fixing the defendant with previous knowledge of the existing danger.

3. Appeal and Error—Objections and Exceptions—Unanswered Questions.

The Supreme Court on appeal will not consider error assigned for the ruling out of unanswered questions, unless it appears in some recognized manner what the answers would have been, or shown that the appellant had been prejudiced thereby.

4. Same—Evidence—Matters at Issue.

Where damages are sought for injury to an employee by the caving in of a ditch where he was at work, and there is evidence that the depth at which he was digging would require bulkheads for safety in soil of a certain character, an unanswered rejected question assuming the character of the soil will not be considered as error on appeal, as the question assumed a matter for the determination of the jury.

5. Master and Servant—Negligence—Safe Place to Work—Instructions—Appeal and Error—Harmless Error.

Where an employer is sued for his negligence in failing to provide his employee a safe place to work in digging a ditch, the alleged negligence being the failure to have bulkheads in the ditch to prevent the falling in of the dirt that caused the injury complained of, a charge of the court that it was the duty of the employer "to see that the place is kept safe," while erroneous, is held as harmless error when, interpreting the relevant portions of the charge in connection therewith, it appears that he charged the jury that it was the employer's duty to provide a reasonably safe place to work and to exercise reasonable care to see that the place was kept safe, etc.

APPEAL by defendants from *Lane, J.*, at March Term, 1915, of (270) MECKLENBURG.

Action to recover damages on account of injuries alleged to have been sustained in the construction of a ditch or trench by reason of the negligence of the defendants. The plaintiff was employed by Sullivan, Long & Hagerty, partners, who are defendants, who were under contract with the city of Charlotte, also a defendant, in the construction of sewer ditches. The contract between the defendants is not material, as no question is raised of the relation between the defendants, nor is it contended that the doctrine of independent contractor arises.

The negligence alleged is that the soil through which the ditch or trench was being dug was rotten and unsafe, and that the defendants failed to leave bulkheads in the ditch and failed to brace it.

The plaintiff was injured by the caving in of the ditch. The ditch was about eight feet deep and two and one-half feet wide at the time of the injury.

The plaintiff introduced evidence tending to sustain the allegations of negligence, and the plaintiff introduced evidence to the contrary. There was evidence on each side as to the custom of leaving bulkheads and of bracing ditches of the depth and character of the one where the plaintiff was working. There are several exceptions to the evidence and one exception to the charge which will be noted in the opinion. There was a verdict and judgment for the plaintiff and the defendants excepted and appealed.

McNinch & Justice for plaintiff.
Brenizer, Black & Taylor and Cansler & Cansler for defendants.

ALLEN, J. Robert Moser, witness for the plaintiff, was asked, "What is the custom with reference to bracing the sides of a ditch or leaving bulkheads where it appeared to be dangerous either from the depth of

the ditch or the character of the earth?" and he replied: "The custom, the necessity of bracing or leaving bulkheads, depends altogether upon the depth of the ditch. If it is a shallow ditch it does not need bulkheads or bracing, but if it is deep enough to reach a man's head, (271) it makes it necessary either to leave bulkheads or bracings, if the ground through which the ditch runs is anything like rotten or liable to cave." The defendants excepted.

The answer to this question, if otherwise objectionable, is harmless, because there is nothing in it which a man of ordinary intelligence would not know without testimony. It amounts to saying that in a shallow ditch you do not need bracing, but if the ditch is deep and through ground that is liable to cave, you do.

Again, this witness, on cross-examination, answered the question which was asked him on direct examination and which is objected to, more positively in favor of the plaintiff. He said: "Without exception, where you are digging a ditch of the depth of eight feet and two and one-half feet wide through hard, solid clay it is necessary to leave bulkheads in it or brace it up. It is a custom with most men to leave bulkheads or brace through whatever sort of soil you may dig, if the ditch is eight feet deep and two and one-half feet wide."

2. Mr. Wilson who was the superintendent in charge of the construction of the sewers and a witness for the plaintiff, was asked, "Did you say anything to Mr. Wilson about bracing that ditch at any time that day?" and he replied: "I told him when he was up there when I got pretty low in the ground that it looked pretty dangerous, and I thought there ought to be some bulkheads left." The defendants excepted.

This conversation occurred on the day of the injury and prior thereto, and it was competent for the purpose of showing that the attention of the defendants was called to the condition of the ditch and of the necessity of using some precautions to render the place where the plaintiff was working reasonably safe.

3. A witness for the defendants testified that he went to the home of the plaintiff on Monday after the injury and did not see the plaintiff, did see his wife, and he was asked, "Did you ask where he was?" The witness was not permitted to answer this question, and the defendants excepted.

There is nothing on the record to show what would have been the answer of the witness nor what was expected to be proved, and we cannot see that the defendants have been prejudiced by the ruling of the court. It may be that the witness did not ask where the plaintiff was, or, if he did, that the person of whom the inquiry was made did not know, or, if she knew, that she would not tell him, or, if she told him,

that the answer would not be prejudicial to the cause of the plaintiff. An appellant is required to show error, and in order to get the benefit of evidence excluded it must reasonably appear what it is intended to prove and that the exclusion of the evidence is prejudicial.

4. A witness for the defendants was asked "To state whether or not Johnson and Williams, digging a ditch of the depth of (272) eight feet and of the width of two and one-half feet in light red clay soil similar to this where Isaiah was excavating, either braced the ditch or left bulkheads in it." The witness was not permitted to answer this question, and the defendants excepted. The record does not show what would have been the answer of the witness to the question, and the exception may be disposed of on the same ground as the preceding one. The question itself is also objectionable because it assumes that the plaintiff was working in light red clay soil, when that was one of the very matters in dispute between the parties.

5. The defendants excepted to the following part of the charge to the jury: "So the court charges the jury that in employing servants to work in ditches, the duty is upon the master, as in all cases of employment, to use reasonable care to see that his servant has a reasonably safe place to do the work which he assigns to him, and to see that the place is kept safe so long as the servant is required to stay therein."

The exception is to the latter part of the charge, where the court says that it is the duty of the employer "to see that the place is kept safe," and this would be objectionable if it stood alone, as the employer is not the insurer of the safety of the employee and is only required to exercise ordinary care to provide a safe place to work; but we must consider the charge as a whole, and when this is done it is free from objection. Reasonable care qualifies both duties which are imposed upon the employer.

His Honor told the jury that the employer must exercise reasonable care to see that the employee has a reasonably safe place to do the work and reasonable care to see that the place is kept safe; and he did not stop here.

He charged the jury further: "An employer is not required to provide an absolutely safe place for his employee to work in. He is not an insurer of the safety of an employee, but, as I have already stated, the duty is upon him to use ordinary care to provide a reasonably safe place in which the employee shall do his work."

And, again, after charging the jury upon the findings which would justify a verdict for the plaintiff, and stating the contentions of the defendants that they had provided for the plaintiff a reasonably safe place in which to work, and while it did not turn out to be a safe place, as the slide occurred, that it was something that could not be foreseen or foretold by them in the exercise of ordinary care. He said: "If you do

so find that there was no failure on their part to exercise ordinary care to provide him a reasonably safe place in which to work, then you will answer the issue 'No,' for there would be no negligence."

We have carefully examined the record and find

No error.

Cited: Hollifield v. Telephone Co., 172 N. C. 724 (3f); *S. v. Davis*, 175 N. C. 727 (3f); *Wilkins v. Cotton Mills*, 176 N. C. 72 (3f); *Bank v. Wysong & Miles Co.*, 177 N. C. 291 (3f); *Killian v. Andrews*, 187 N. C. 811 (2f).

(273)

TROY AND NORTH CAROLINA GOLD MINING COMPANY v. SNOW LUMBER COMPANY, C. M. MEISENHEIMER ET ALS.

(Filed 1 December, 1915.)

1. Pleadings—Speaking Demurrers.

A demurrer which denies the allegations of the complaint raises issues of fact and partakes of the nature of a speaking demurrer, which will not be sustained.

2. Same—Parties—Appearance—Publication.

When it is alleged in the complaint that the necessary parties are unknown to the plaintiff, but that service by publication has been made on all who have not appeared and made themselves such, it is sufficient, and a demurrer on the ground that it appears therefrom that sufficient parties to the suit have not been made will be overruled.

3. Deeds and Conveyances—Interpretation—Trusts and Trustees.

A deed will be construed as a whole so as to give a meaning to every part thereof, when permissible, without special regard for its formal arrangement, so as to effectuate the intent thereof; and a deed to E. and certain others, trustees of the T., etc., corporations, with habendum, "to have and to hold the above described tracts of land to them, the above mentioned trustees, their heirs and assigns forever," is held to convey the lands to the parties designated as trustees for the corporations named.

4. Courts—Jurisdiction—Trusts and Trustees.

The Superior Court has jurisdiction to appoint new trustees for those named in a deed in trust of lands when necessary to preserve the trust estate, which may be done in an action asking for other relief.

5. Equity—Title—Parties—Trespass.

The owners of the equitable title to lands can maintain their action for recovery thereof and for damages against the wrongdoer, without the

necessity of first having new trustees appointed by the courts in the place of those who are dead or whose whereabouts are unknown.

6. Pleadings—Demurrer—Limitation of Actions—Laches.

The plea of the bar of the statute of limitations, raised in this case by demurrer to the complaint, cannot be entertained; nor will the question of laches, as there are no facts established upon which the Supreme Court can pass intelligently.

7. Uses and Trusts—Statutes—Title.

Where lands are conveyed to trustees, without specifying any conditions, the statute will execute the trust by transferring the possession to the use, and the *cestui que trust* will acquire the entire estate.

8. Deeds and Conveyances—Trusts and Trustees—Beneficiaries—Misnomer—Parol Evidence.

The identity of a person named as a beneficiary of a trust created by deed may be shown by parol evidence, where it is at most a misnomer or latent ambiguity, and it is apparent that the claimant was the person intended.

APPEAL by defendants from *Shaw, J.*, at April Term, 1915, of (274) MONTGOMERY.

Civil action heard on demurrer.

Plaintiff alleges in the complaint that on 1 August, 1866, James Crump, by deed duly executed and registered, conveyed to it, but by the name of the Troy (N. Y.) and North Carolina Gold Mining Company, four tracts of land in Montgomery County, this State, which are fully described in the deed which was made to Charles Eddie and eight others, trustees of the Troy (N. Y.) and North Carolina Gold Mining Company, as appears by the premises of the deed, and in the *habendum* as follows: "To have and to hold the above described tracts of land to them, the above mentioned trustees, their heirs and assigns forever." It is further alleged that the name of the company, as it appears in the deed, was inserted by inadvertence and the mutual mistake of the parties and the draftsman of the deed, and it was intended to stand for and be the name of the plaintiff, and should be considered as such, as at the time there was no corporation having the name of the Troy (N. Y.) and North Carolina Gold Mining Company, the only company having a name at all like that one being the plaintiff in this action, and that it was the intention of the parties to the deed to convey the land to said trustees to be held by them for this plaintiff, and they acted as such for plaintiff in taking the deed, and if said intention is not fairly expressed in said deed, the statement thereof was omitted by the mutual mistake of the parties. It is also alleged that the trustees are all dead and their heirs or devisees are unknown to the plaintiff, except four of them, who have been made parties as defendants to this action, and those who are unknown

have been brought in by publication, and still others who reside in this State have been personally served with process. The plaintiff alleges that the legal effect of the deed is to vest the title to the land in the plaintiff, but if this is not so, plaintiff is entitled to have new trustees appointed and a conveyance of the legal title ordered by the court. It is further alleged that defendants are in possession of the land and unlawfully withhold the same from the plaintiff and have wrongfully cut valuable timber therefrom, to plaintiff's damage, and it prays for general and special relief

Defendant demurred upon the following grounds:

1. That the heirs and devisees of the trustees, who are dead, have not been made parties to the action.

2. That the land is conveyed by the deed to certain persons, as trustees, and their heirs and devisees, and there is no allegation that this was done by inadvertence or mistake, and, therefore, it appears that plaintiff has no interest in the land.

3. That the grantees named in the deed are all dead, and no new trustees have been appointed to act in place of them.

(275) 4. It appears that this action was brought many years after the execution of the deed, for a correction thereof, by converting the persons named therein as grantees into trustees for the plaintiff, notwithstanding that said grantees are dead and their heirs and devisees have not been made parties.

5. That the complaint fails to state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendants who have been made parties to this action.

6. That there is a defect of parties in that it appears that the grantees named in said deed are dead and their heirs or devisees have not been made parties to the action.

The court overruled the demurrer and allowed defendants to answer, and they appealed from the order of the court overruling their demurrer.

R. T. Poole, U. L. Spence and Harold T. Hathaway for plaintiffs.

Jerome & Jerome for defendants.

WALKER, J., after stating the case: We will consider the grounds of demurrer in the order of their statement by the defendant.

First. It will be observed from the above synopsis of the complaint and demurrer that the latter raises issues of fact rather than questions of law, by simply denying the allegations, and, in this respect, it partakes somewhat of the nature of a speaking demurrer, and is not confined to its true and limited function. As to the first ground of demurrer, it appears sufficiently that the heirs or devisees of the trustees

have been made parties by personal service of process or by substituted service.

Second. It is substantially alleged in the complaint that if the deed really conveys the land to the individuals who are named as trustees, so as to vest the title in them and for themselves, and not as trustees of plaintiff, it was not the intention of the parties so to do, but to convey to them as trustees for the plaintiff, and if this is not expressed in the deed it resulted from the mutual mistake of the parties. But we think that the deed does convey the land to the trustees for the plaintiff. It is familiar learning that a deed, as well as any other instrument, must be construed as a whole and a meaning by construction given to every part thereof, and another rule is that it must be interpreted according to the intention of the parties, to be gathered from its words, and without special regard for its formal arrangement. *Brown v. Brown,* 168 N. C., 4, at p. 10, where we said: "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 (276) most strongly against the grantor. 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. Hence, words, when it can be seen that the parties have so used them, may be received in a sense diffrent from that which is proper to them; and the different parts of the instrument may be transposed in order to carry out the intent." Citing numerous cases, among them *Campbell v. McArthur,* 9 N. C., 38; *Kea. v. Robeson,* 40 N. C., 373; *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394. And 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 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.' 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." Citing *Kea v. Robeson, supra; Real Estate Co. v. Bland,* 152 N. C., 225; *Puckett v. Morgan,* 158 N. C., 344. Applying this rule of construction to the deed in question, we entertain no doubt that the meaning of the parties was to convey the land to the persons named, in trust for the plaintiff.

Third. The object of this suit is to have new trustees appointed in place of those whose names appear in the deed, and the court below had jurisdiction of the case and the power to grant the relief. It was held in *Roseman v. Roseman,* 127 N. C., 494, 497, where a somewhat similar question was raised: "The Superior Court undoubtedly had authority, under its general equity jurisdiction, to appoint a new trustee to prevent a failure of the trust, if the proceeding had begun by writ returnable to that court." It was not necessary, therefore, that trustees should (277) have been appointed in a separate proceeding before this suit was brought.

Fourth. We doubt if any correction of the deed is necessary, as this action is for the recovery of the possession of land and damages for a trespass thereon, and, as against a wrongdoer, plaintiff can recover on its equitable title. *Shannon v. Lamb,* 126 N. C., 47; *Hinton v. Moore,* 139 N. C., 44. In *Murray v. Blackedge,* 71 N. C., 492, it was held that the equitable owner of land may maintain an action for its recovery although the legal estate is in his trustee; and to the same effect are these cases: *Farmer v. Daniel,* 82 N. C., 152; *Ryan v. McGehee,* 83 N. C., 500; *Condry v. Cheshire,* 88 N. C., 375. Whether the plaintiff's cause of action is barred by laches or the statute of limitations is a question which is not now before us. The bar of the statute of limitations cannot be raised by demurrer, and, as to laches, there is nothing in the present stage of the case that will enable us to pass upon that question. It may be different when the facts are fully disclosed, but we do not know now what they will be.

As the deed created a passive, as distinguished from an active, trust, there being nothing for the trustees to do but to hold the legal title for the corporation, the use was executed by the statute, or, in other words, possession was transferred to the use, and the corporation thereby acquired the entire estate. *Johnson v. Prairie,* 91 N. C., 159; *Hallyburton v. Slagle,* 130 N. C., 482; *Cameron v. Hicks,* 141 N. C., 21.

As to the plaintiff being described by the wrong name in the deed, this is at most but a misnomer or latent ambiguity, which can be explained by parol evidence so as to fit the description to the person or corporation intended. *Institute v. Norwood,* 45 N. C., 65; *Ryan v. Martin,* 91 N. C., 465; *Asheville Division v. Aston,* 92 N. C., 579, 584; *Simmons v. Allison,* 118 N. C., 776; *Keith v. Scales,* 124 N. C., 497; *Walker v. Miller,* 139 N. C., 448. A misnomer does not vitiate, provided the identity of the corporation with that intended to be named by the parties is apparent. Angell & Ames Corp., secs. 185, 234; Morawetz Corp., 181. "The name of a corporation frequently consists of several words, and an omission or alteration of several of them is not material." Angell & Ames Corp., sec. 99. "A grant of land from an individual to a corporation will be good if it can be clearly discovered from the terms of it what corporate body was intended, though an omission or mistake in the corporate name may have been made." *Asheville Division v. Aston, supra;* citing Grant Corp., 51. *Ryan v. Martin, supra,* is very much in point here, for here it was said: "The objection that the corporation in question was sometimes called the 'Deep River Mining Co.' and 'Deep River Copper Mining Co.,' and other like names, is not well founded. A corporate name is essential, but the inadvertent or mistaken use of the name is ordinarily not material if the parties really intended the corporation by its proper name. If the name is expressed in (278) the written instrument, so that the real name can be ascertained from it, this is sufficient; but if necessary, other evidence may be produced to establish what corporation was intended.' And the same rule applies to devises and bequests to corporations. A misnomer of a corporation has the same legal effect as a misnomer of an individual."

Fifth. The fifth and sixth grounds of demurrer have been fully met by what we have already said in regard to the others.

The decision of the court in overruling the demurrer was correct, and we affirm its order. We do not sustain the plaintiff's contention that the demurrer is frivolous and, being so, they are entitled to judgment; and the other part, therefore, permitting defendants to answer over, will stand, defendants to pay the costs of this Court.

Affirmed.

Cited: Mining Co. v. Lumber Co., 172 N. C. 593 *S.c.; Williams v. Williams,* 175 N. C. 163 (3f); *Parrish v. Hodge,* 178 N. C. 135 (3g); *Seawell v. Hall,* 185 N. C. 83 (3f); *Shephard v. Horton,* 188 N. C. 788 (3f); *Freeman v. Rose,* 192 N. C. 733 (3b); *Benevolent Society v. Orrell,* 195 N. C. 408 (3p); *Hass v. Hass,* 195 N. C. 739 (3p); *Bank v. Sternberger,* 207 N. C. 819 (7f); *Jefferson v. Jefferson,* 219 N. C. 338

(3f); *Ins. Co. v. Motor Lines,* 225 N. C. 591 (6f); *Aiken v. Bank,* 227 N. C. 455 (7f); *Byrd v. Patterson,* 229 N. C. 158 (8f).

NEY McNEELEY, TRUSTEE, v. W. H. MILES SHOE COMPANY.

(Filed 1 December, 1915.)

1. Bankruptcy—Unlawful Preference—Insolvency—Issues.

To constitute an unlawful preference given to a creditor under the bankrupt act, it requires that the bankrupt be insolvent at the time the preference was given; that it was given within four months before the filing of the petition in bankruptcy, and that the person receiving such preference shall have had reasonable cause to believe that a preference was intended: and while, in a trustee's action to establish that such preference had been given by the bankrupt to one of his creditors, it is better for the court to submit a separate issue as to the insolvency of the bankrupt at the time of the alleged transaction, it is *held,* in this case, that the jury's answer to the issue submitted is determinative of the controversy in all of its essential elements, under a clear and comprehensive charge of the court.

2. Bankruptcy — Burden of Proof — Unlawful Preference—Insolvency—Partnership.

The trustee in bankruptcy has the burden of proving that a transaction between the bankrupt and his creditor was an unlawful preference under the act, not that there was an intent to defraud, but an intent to prefer; and where the bankrupts are partners in business the bankruptcy of one at the time of the transaction is not sufficient, for, as each partner is liable for the firm's debts, the insolvency of all must be shown.

3. Bankruptcy—Unlawful Preference—Insolvency—Imputed Knowledge—Inquiry.

It is not necessary that a creditor dealing with the bankrupt should have known of his insolvency at the time of receiving a preference, for it is sufficient if he knew of such facts which would have put a reasonably prudent man upon inquiry which would have revealed to him that the transfer by the bankrupt was unlawfully preferable in its effect.

4. Issues Tendered—Duty of Counsel—Issues Submitted—Sufficiency.

Counsel should prepare such issues as he thinks arise from the pleadings and are proper to be submitted, and he may not object to those prepared and submitted by the court, when they are sufficient, under his charge, to a proper determination by the jury of all the matters relative to the inquiry.

(279) APPEAL by defendant from *Devin, J.,* at May Term, 1915, of UNION.

Civil action tried upon this issue:

1. Did the defendant, at the time it received the check or shoes, or both, have reasonable cause to believe that it was intended thereby to give a preference? Answer: As to the $100 cash payment, No. As to the $582, Yes.

From the judgment rendered defendant appealed.

W. B. Love for plaintiff.

McNinch & Justice for defendant.

BROWN, J. Plaintiff, as trustee in bankruptcy of the Smith-Roberts Company, a partnership composed of Jacob Smith and J. W. Roberts, sues to recover the value of certain shoes delivered to defendant by the bankrupts and constituting an unlawful preference within the terms of the bankrupt law.

The act of Congress, known as the Bankrupt Law, among other things, provides as follows: "That a person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after filing the petition, and before the adjudication, suffered or let a judgment be entered against him, or made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other such creditors of the same class. If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe it was intended therby to give a preference, such shall be void by the trustee, and he may recover the sum of such preference."

It is admitted that the Smith-Roberts Company, Jacob Smith and J. W. Roberts, were duly adjudged bankrupts, and that the plaintiff was elected trustee of their estates. It is also admitted that the $100 was paid and the shoes turned over to the defendant within four months prior to the adjudication. It is also admitted that the value of the shoes is $582.

The first assignment of error is to the failure of the court to submit an issue as to the insolvency of the bankrupts at the time of the alleged preference. We do not think the failure to submit such issue constitutes reversible error, although it would have been better to have submitted a separate and distinct issue as to insolvency.

There are three essential elements necessary to constitute an (280) unlawful preference: (1) the insolvency of the bankrupts at the time the preference is given; (2) that it shall be given within four months before the filing of the petition in bankruptcy; and (3) that the person re-

ceiving such preference shall have had reasonable cause to believe that a preference was intended.

The second essential is admitted, and we think the first and third essentials fully covered by the charge of the court, which was as follows:

"It is admitted here that the payment of the $100 in cash and the transfer of the shoes both took place within four months before the filing of the petition in bankruptcy, so that if you find from the evidence that at the time of such transfers, that is, the payment of the $100 in cash and the transfer of the shoes, the Smith-Roberts Company and Jacob Smith and J. W. Roberts were insolvent, and you further find that the effect of such transfer was to enable the Miles Shoe Company to obtain a greater percentage of its debt than any other creditor, then you will direct your inquiry to the issue which is submitted to you, 'Did the defendant at the time it received the cash or shoes, or both, have reasonable cause to believe that it was intended thereby to give a preference?' "

After charging the jury that the burden of proof was on the plaintiff, the court said: "It is not necessary, in order to answer this issue in the affirmative, that you find there was an intent to defraud the creditors, but an intent to prefer and constitute a preference. Mere knowledge on the part of the creditor that the debtor could not pay all his debts unless he could collect his accounts would not be sufficient, but it would be necessary not only to appear that the firm, but each individual composing the firm, was insolvent, because each individual would be liable for the debts."

Again: "If the creditor knew facts which would put a reasonably prudent man on inquiry, and that such inquiry would have shown that the transfer was preferable in its effect; that the debtor was insolver and the transfer was to give greater percentage to one creditor ver another, it would be a preference."

In this case, defendant tendered no issue and did not exc[illegible]t to the one submitted. It is the duty of counsel to prepare and submit such issues as he thinks arise from the pleadings, and if he fails to do so, then it becomes the duty of the court to prepare and submit the issues. The court having submitted the issue and the defendant having failed to except to same, then he consents to the issue submitted, and cannot, after the case is disposed of, be heard to complain that other issues were not submitted. Where counsel does not tender such issues as he may desire in the court below and show their pertinency, he cannot complain here that those issues were not framed by the court and submitted
(281) on the trial. *Curtis v. Ca[illegible]*, 84 N. C., 41; *Kidder v. McIlhenny*, 81 N. C., 123.

The issue submitted, taken in connection with the explicit instruction of the court, as answered by the jury, determines the question of insol-

vency as clearly as if a separate issue had been submitted. Every phase of the case was presented for the determination of the jury under the one issue submitted, and if one issue fulfills the purpose of affording a fair opportunity to each party of developing his case, it is sufficient. *Wilson v. Taylor,* 154 N. C., 211; *Zollicoffer v. Zollicoffer,* 168 N. C., 330.

The remaining assignments of error are directed to the charge of the court and need not be discussed. The charge as a whole is a very lucid and correct presentation of the case. The entire evidence fully justifies the finding of the jury that there was an unlawful preference, and that defendants had reason to know it.

Cited: Bridgers v. Trust Co., 198 N. C. 497 (1f).

STEPHEN DAVIDSON, ADMINISTRATOR OF LACEY DAVIDSON, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 1 December, 1915.)

1. Railroads—Pedestrians—"Stop, Look and Listen"—Contributory Negligence.

The principle that it is the duty of a traveler, whether on foot or otherwise, to stop, look and listen for approaching trains before entering upon a railroad crossing, and that his failure to do so is negligence which will bar his recovery for injuries received from passing trains, if it is the proximate cause thereof or of resulting death, is not always an absolute one, and may be qualified by attending circumstances.

2. Same—Special Conditions—Trials—Evidence—Questions for Jury.

Where an injury resulting in death is received by a pedestrian who has failed to look and listen before entering upon a railroad track at a public crossing, attributable to his having been struck by a passing train, and there is evidence tending to show that the track in question was a spur—crossing the street from the main line; that the track was covered from the effect of travel on the street, except the rails, and only one line of these showed above the level of the ground, and that only slightly; that the intestate, a stranger, was killed by a train from the main line running suddenly upon the spur-track at an unusual time of day, without any warning of its approach and without proper lookout to give notice thereof: *Held,* the question of the intestate's contributory negligence in failing to stop, look and listen before entering upon the railroad should be submitted to the jury, and such will not bar the action as a matter of law.

APPEAL by defendant from *Webb, J.,* at September Term, 1915, of MECKLENBURG.

(282) Action to recover damages for the wrongful death of the plaintiff's intestate, caused, as the plaintiff alleges, by the negligence of the defendant. The defendant denies that it was guilty of negligence and pleads that the death of the intestate was caused by her own contributory negligence.

The plaintiff introduced the following evidence:

J. A. Overcash, a witness for the plaintiff, testified: "The main line of the defendant, extending from Charlotte to Shelby, runs about parallel to West Eleventh Street, and within thirty feet of it. There is a spur-track, extending from this main line of railway into the Ice and Fuel Company's plant, and then further on, in a northerly direction, to the Buckeye Oil plant, as is shown on blue-print. This spur-track crosses West Eleventh Street, and enters the yard of the ice plant through two large gates—the ice plant being otherwise fenced up.

"For the last five years, since my shop has been located where it now is, a great many people, chiefly colored, travel West Eleventh Street, principally along the path located next to the fence of the ice company's plant, and particularly about six or seven o'clock in the morning, when I have seen as many as seventy-five people traveling along said street.

"At the time plaintiff's intestate was killed, the inside rail on the curve of this spur-line, where it crosses Eleventh Street, was, and has been since I have been there, level with the ground. You can see the far rail, which is raised the least bit above the ground, the cross-ties being covered completely up. Wagons, automobiles, and buggies run back and forth along West Eleventh Street across this spur-track. There were no signs up at this point indicating that it was a railroad crossing. Where the spur-track leaves the main line there is an embankment about three and one-half feet high, and at the time plaintiff's intestate was killed there was grass there. Plaintiff's intestate was killed about seven o'clock a. m., in August, 1912. I was going to work that Monday morning, and the chief engineer and I had done some work on the gates of the ice company plant, which work I had never seen before, and I had stopped at the gates to look at the job we had done. I was never thinking about the train. I was standing there, looking at the work, when I heard somebody holler, 'Look out, there!' It was to my left, and the train was backing in on me. I jumped off the track and I saw this woman coming, walking right along by the fence at the same time. I saw her walk into the train; saw her go down, and the wheels pass over her. When I first saw her she was just a little piece from the track, going to cross it. I did not see her walk on the track. Heard no bell rung, or whistle blown; train was making no fuss; first I knew of its coming was when the watchman hollered at me. I was standing right in the gates at that time There was a man on top of the leading car as

the train was being backed on the spur-line—near the middle of the car, and on the right side of it as it was being backed. Don't (283) know whether he could have seen the woman from his position or not, as she was down at the left corner of the car. When she was hit I was about fifteen feet up the track away from her. When a man hollered I jumped off. It was almost done together. You might have counted six after he hollered before she was struck. The train was backing from the main line across Eleventh Street through the gates. She was walking right along the pathway next to the ice company fence from a westerly direction; was in the street; pathway was to the left of the street, and she was in about six feet of the track when the man hollered. The car was backing into here (indicating gates), and it was nearly behind her and to her right. She was going along the path. When the man hollered 'Look out!' the front end of the leading car, which was being backed across Eleventh Street, was about the center of the street, which at that point was twenty feet wide. It hit her back on the shoulder first and knocked her down and turned her right around, and when she fell she fell on her back. She was something like six feet from the westerly rail of the track when the man hollered 'Look out!' Would say that the side of the box car extended about three feet over the rail. Train, when it went up the main line before going into spur-track, was going pretty fast towards Shelby. There were two cars behind and one in front of the engine. They then headed in on the ice house spur-track, to deliver the car ahead of the engine, which was pushing it in the direction of the gates; one car between the engine and the ice house, The train went up on the main line in the direction of Shelby, passed the switch, reversed and came back. When the gates in the fence which is around the ice house plant are closed it has the appearance of being a solid fence. The gates were open that morning when plaintiff's intestate was killed. She lived about two blocks and a half from this crossing. She looked to be twenty-two or twenty-three years old; had never seen her walking along there before.

"The engineer and fireman could have seen the woman as she approached the crossing. If there had been a man on the leading end of the car he could have seen her walking along there as she approached the crossing. The man, as I have said, was near the middle of the car, and I was some fifteen feet further up the track from where the woman was killed. The train backed up from behind the woman."

John Hudson testified: "I live about a block west of Johnson Street crossing. When I was going on up in the direction of the crossing and the train had kinder slackened up at Johnson Street crossing, and I came on up there and sorter slacked up myself, and they passed me, and they let out from there, and they put on speed, going towards the ice

house. I live on Eleventh Street, and had cut into Johnson Street to go across the railroad. When I saw them the train went on, passed
(284) the spur-track switch without stopping. Didn't know where they were going. Saw them go into the spur-track. They were ringing no bell or blowing no whistle. Nobody on cars anywhere besides the engine as they passed me. People use Eleventh Street at this crossing a good deal. No sign up to indicate that it was a railroad crossing; no watchman there."

There was other evidence introduced tending to support the contention of the plaintiff.

At the conclusion of the evidence his Honor entered judgment of nonsuit and the plaintiff excepted and appealed.

E. R. Preston, F. O. Osborne and John M. Robinson for plaintiff.
Cansler & Cansler for defendant.

ALLEN, J. The defendant does not contend that there is no evidence of negligence, but it insists that on the evidence introduced by the plaintiff his intestate was guilty of contributory negligence, in that she was killed upon a public crossing and that she entered thereon without looking and listening.

The rule prevails very generally and is firmly established in our law that it is the duty of a traveler, whether on foot or in some vehicle, to look and listen before entering upon a railroad crossing, and that his failure to do so is negligence which will bar a recovery if it is the proximate cause of an injury or death, but this duty is not always an absolute one and may be qualified by attendant circumstances, *Sherrill v. R. R.*, 140 N. C., 252; *Talley v. R. R.*, 163 N. C., 571; *Fann v. R. R.*, 155 N. C., 141; *Johnson v. R. R.*, 163 N. C, 443.

In the last of these cases, after stating the rule that it is the duty of a traveler to look and listen, the Court says: "The duty of a traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence by not taking proper measures for his safety to be submitted to the jury"; and in 33 Cyc., 1003, "The mere failure, however, to look or listen, or to look and listen before crossing, is not as a general rule, negligence *per se* as a matter of law; but whether or not such failure is negligence usually depends upon the circumstances at the particular time and crossing and is a question for the jury to determine, although it may be negligence as a matter of law under some circumstances"; and again, page 1007, "a traveler's knowledge or familiarity with the railroad crossing and his knowledge of the schedule of the approach of trains have an important bearing on the question of his

contributory negligence. So it may be contributory negligence for him to go on a crossing with which he is familiar without looking or listening for approaching trains, when, under similar circumstances, it would not be contributory negligence for a person who is a (285) stranger to the crossing to do so."

Circumstances which may be pertinent and may qualify the duty to look and listen are obstructions which prevent the exercise of the sense of sight and hearing; the condition of the crossing; the use made of the track over which the crossing runs; the knowledge and familiarity of the person with the crossing and other circumstances.

In this case there is no evidence of an obstruction which would have prevented the intestate from seeing the approaching train, but if the evidence is considered in the most favorable light for the plaintiff, which we must do upon a motion for judgment of nonsuit, it appears that the intestate was comparatively a stranger in Charlotte and was not familiar with the crossing and its surroundings; that the crossing was on a spur-track running to industrial plants and was not regularly used; that it was not generally used in going to the industrial plants early in the day, the time that the intestate was killed; that there was no sign at the crossing; that the rails of the spur-track were practically level with the ground and could not be easily discovered by reason of earth left thereon by the frequent passing of vehicles across them; that when the intestate came near to the crossing the train, which afterwards struck her, was on the main line and that it came upon the spur-track without ringing a bell or blowing a whistle, with the engine pushing a car in front of it, and with no man on the rear of the car; that it was making no noise, and it struck the intestate from behind.

The inference may be drawn from this evidence that the crossing was in such condition that one unacquainted with the surroundings and in the exercise of ordinary care might approach it without knowing that there was any railroad track, or if the track was discovered, might reasonably believe that it was not in use.

As was said in *Doyle v. R. R.*, 139 N. Y., 637, upon facts similar to those in this case: "But the circumstances are to be considered. She was rightfully on a public street, walking on the south sidewalk in the direction of the coming train. She did not know of this isolated track of the defendant. Its existence was not indicated by the conformation of the ground, nor by any flagman or flaghouse or other sign. If her attention had been challenged by a bell or whistle, this deception might have been corrected in time to have prevented any injury. We think it was for the jury to say, under all the circumstances, whether the plaintiff exercised ordinary prudence and care."

We express no opinion upon the weight of the evidence, but think it is sufficient to entitle the plaintiff to have it considered by a jury.

Reversed.

Cited: Rigsbee v. R. R., 190 N. C. 233 (2g).

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G. M. GLENN v. SOUTHERN EXPRESS COMPANY.

(Filed 1 December, 1915.)

1. Intoxicating Liquors—Interstate Commerce—Federal Regulation—Repealing Acts—State Laws.

The Webb-Kenyon Act, withdrawing from the protection of interstate commerce the shipment of intoxicating liquors where such are intended to be received in violation of the State law, etc., is a constitutional and valid law.

2. Interstate Commerce—State Regulation—Police Powers.

The Webb-Kenyon law does not confer upon the States any right or power to regulate interstate commerce, for the act itself is a regulation thereof, and it is not objectionable for want of uniformity arising from the differences in the State laws regarding the question of intoxicating liquors.

3. Intoxicating Liquors—Police Powers—Constitutional Laws.

The sale of intoxicating liquors affects the morals, health and sobriety of the people of a locality, and falls within the police powers inherent in a State, and which the States have not delegated in the Constitution to the Federal Government.

4. Same—Personal Use—Interpretation of Statutes.

Our statute, ch. 87, Laws 1915, enacted in accordance with the police powers and the declared public policy of the State with reference to prohibiting the manufacture and sale of intoxicating liquors, etc., is in accord with the Webb-Kenyon Act of Congress, and not in violation thereof, prohibiting the carrier to transport and the consignee to receive more than one quart of intoxicating liquor within the period of fifteen days; and this position is not affected by the fact that certain consignees may want the liquor for their own personal use, it being within the power of the Legislature to prevent an evasion of the law by persons who may make such claims, but who, in fact, intend to violate the law by making sales or unlawful disposition of the liquor to others.

APPEAL by defendant from *Daniels, J.*, at May Term, 1915, of WAKE.

The plaintiff, G. M. Glenn, brought two suits against the Southern Express Company, one for the value of one quart of whiskey and dam-

ages for refusal to deliver same, and the other for a *mandamus* to compel the Southern Express Company to accept at Richmond, Va., a shipment consigned to the plaintiff at Raleigh, North Carolina, containing one gallon of whiskey. The questions of law involved in the two suits are the same, and they will be considered together.

FACTS IN THE ACTION FOR DAMAGES.

G. M. Glenn, a citizen of the State of North Carolina and a resident of Raleigh, on 5 April, 1915, ordered by United States mail, from H. Clarke & Sons, duly licensed liquor dealers in Richmond, Va., one quart of whiskey, and sent the order for this quart of whiskey, accompanied by $1.25, the purchase price thereof, from his residence in Raleigh, N. C., to H. Clarke & Sons, and instructed them to ship one quart (287) of whiskey to him at Raleigh. This order and the purchase price of the whiskey were received by H. Clarke & Sons, at Richmond, Va., by United States mail and the order was there accepted by them, and in pursuance thereof H. Clarke & Sons delivered the package of whiskey to the Southern Express Company at its office in Richmond, Va., marked with the name and address of G. M. Glenn as the consignee thereof, and with a statement showing the nature and quantity of the contents plainly marked on the outside cover of the package. The Southern Express Company accepted this package and transported it from its office at Richmond, Va., in the regular course of its business as a common carrier by express to Raleigh, N. C., and delivered it to G. M. Glenn on 7 April, 1915.

On 6 April, 1915, G. M. Glenn ordered by United States mail from H. Clarke & Sons another quart of whiskey and sent a similar order therefor, accompanied by the purchase price, from his residence in Raleigh, to H. Clarke & Sons at Richmond, and instructed them to ship this second quart of whiskey to him at Raleigh. This order and the purchase price of the whiskey were received by H. Clarke & Sons at Richmond, Va., by United States mail, and the order was there accepted by them, and in pursuance thereof they delivered a package containing one quart of whiskey to the Southern Express Company at its office in Richmond, Va., marked with the name and address of G. M. Glenn as the consignee thereof, and with a statement showing the nature and quantity of the contents marked plainly on the outside cover of the package, and paid the proper express charges for transportation of this package to G. M. Glenn, at Raleigh, N. C. The Southern Express Company accepted this package and transported it from its office at Richmond, Va., in the regular course of its business as a common carrier by express, to Raleigh, N. C. This package containing one quart of whiskey arrived at the office of the Southern Express Company at Raleigh, N. C., on 8 April,

1915, and G. M. Glenn appeared at the office on 8 April, 1915, and demanded the delivery thereof and was prepared to sign a book or any other receipt required by the Southern Express Company under the law, and the express company refused to deliver this package upon such demand.

The quart of whiskey contained in the first package, which was delivered to G. M. Glenn, and the whiskey contained in the second package, which the express company refused to deliver, were intended by Glenn for his personal use. At the time when Glenn ordered each of these shipments from H. Clarke & Sons he advised them that the whiskey was for his personal use, and on the outside of each of the packages the shippers marked, "For personal use of the consignee."

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FACTS IN APPLICATION FOR WRIT OF MANDAMUS

On 8 April, 1915, G. M. Glenn ordered by United States mail from H. Clarke & Sons, duly licensed liquor dealers in Richmond, Va., one gallon of whiskey and sent the order for this gallon of whiskey, accompanied by $2.85, the purchase price thereof, from his residence in Raleigh, N. C., to H. Clarke & Sons, at Richmond, Va., and instructed them to ship the said gallon of whiskey to him at Raleigh. This order and the purchase price of the whiskey were received by H. Clarke & Sons at Richmond, Va., by United States mail and the order was there accepted by them. On 10 April, 1915, H. Clarke & Sons, in pursuance of the acceptance of this order, tendered a package containing one gallon of whiskey, together with the regular scheduled charges for the transportation thereof from Richmond, Va., to Raleigh, N. C., to the Southern Express Company, at its office at Richmond, Va. This package was marked with the name and address of G. M. Glenn as the consignee thereof, and with a statement showing the nature and quantity of the contents plainly marked on the outside of the package. The whiskey contained in this package was for the plaintiff's personal use, and at the time it was ordered G. M. Glenn advised the shippers that the whiskey was for his personal use, and the package containing the whiskey was plainly marked on the outside, "For personal use of consignee."

The Southern Express Company refused to accept this shipment.

It was admitted that the Southern Express Company is a common carrier within the meaning of the act of Congress entitled "An act to regulate commerce," and the amendments thereto, and that the Southern Express Company is engaged in the business of a common carrier for hire on railroads operating through and between the States of Virginia and North Carolina and other States.

The defendant refused to deliver the quart of whiskey to the plaintiff and to receive the gallon of whiskey, contending that it was forbidden

to do so by sections 1, 2, and 3 of ch. 97, Laws of 1915, which read as follows:

"SECTION 1. That it shall be unlawful for any person, firm or corporation, or any agent, officer or employee thereof, to ship, transport, carry or deliver in any manner or by any means whatsoever, for hire or otherwise, in any one package or at any one time, from a point within or without this State, to any person, firm or corporation in this State, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons, and it shall be unlawful for any spirituous or vinous liquors or intoxicating bitters so shipped, transported, carried or delivered in any one package to be contained in more than one receptacle.

"Sec. 2. That it shall be unlawful for any person, firm or corporation at any one time, or in any one package, to receive at a point within the State of North Carolina for his or her use or for the (289) use of any person, firm or corporation, or for any other purpose, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in quantity greater than five gallons.

"Sec. 3. That it shall be unlawful for any person, firm or corporation, during the space of fifteen consecutive days, to receive any spirituous or vinous liquors or intoxicating bitters in a quantity or quantities totaling more than one quart, or any malt liquors in a quantity greater than five gallons: *Provided,* that the provisions of sections one, two and three shall not apply to the receipt by a common carrier for transportation to a point in another State where delivery is not forbidden by the laws of such State."

Judgment was rendered in the first action denying the right of the plaintiff to recover, and in the second, refusing the writ of mandamus, and the plaintiff appealed.

Lawrence Maxwell, Joseph S. Graydon and Murray Allen for plaintiff.

A. B. Andrews, Jr., for defendant.

ALLEN, J. Prior to the enactment of the Webb-Kenyon law the refusal of the defendant to deliver the quart of whiskey, or to receive for shipment the gallon ordered by the plaintiff, could not have been upheld, as they would have been, on the facts in the record, interstate shipments for personal use (*R. R. v. Brewing Co.,* 223 U. S., 70), and it becomes necessary, therefore, to inquire into the effect of the act of Congress upon shipments of intoxicating liquors from one State to another.

The constitutionality of the Webb-Kenyon law has been sustained by this Court in *S. v. R. R.,* 169 N. C., 303, and in other jurisdictions

where the question has been considered (*S. v. Doe,* 139 Pac. (Kan.); *Zinnerman v. Oregon,* 210 Fed., 378; *W. Va. v. Express Co.,* 219 Fed., 794; *Atkinson v. Express Co.,* 78 S. E., 516 (S. C.); *Express Co. v. Beer,* 65 So., 575 (Miss.); *S. v. Express Co.,* 145 N. W., 451 (Iowa); *Express Co. v. State,* 66 So., 115), and the history of legislation by Congress and the reasoning in the decided cases indicate that the Supreme Court of the United States will reach the same conclusion.

Prior to any legislation by Congress it was held in *Bowman v. R. R.,* 125 U. S., 465, that a statute of the State of Iowa was void which forbade a carrier from bringing into the State any intoxicating liquors without procuring the certificate required by the statute.

This was followed by *Leisy v. Harbin,* 135 U. S., 100, which not only recognized intoxicating liquors as a commodity which, when carried from State to State, was entitled to protection as interstate commerce, but also that this protection included the right to sell in the original package.

(290) These decisions were not predicated upon the inability of Congress to legislate upon the subject, but on the ground that inasmuch as Congress had enacted no law restricting or regulating interstate commerce in intoxicating liquors, it was its desire that such commerce should be free and untrammeled.

This is clearly shown by the opinion in the last case, in which the Court says:

"Whenever, however, a particular power of the General Government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the General Government intended that power should not be affirmatively exercised, and the action of the State can not be permitted to affect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the State to do so,* it thereby indicates its will that such commerce shall be free and untrammeled"; and again, "Undoubtedly, it is for the legislative branch of the State Government to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public safety; but, notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the

regulation of interstate commerce is concerned, *to remove the restrictions upon the State in dealing with imported articles of trade within its limits,* which have not been mingled with the common mass of property therein, *if, in its judgment, the end to be secured justifies and requires such action.*" (Italics ours.)

These quotations are taken from the case (*Leisy v. Harbin*) that has gone furtherest in rendering ineffective statutes enacted by the States to regulate or to destroy the traffic in intoxicating liquors, and the language is without meaning unless it was intended to convey the idea that inaction by Congress indicates a purpose that commerce shall be free and untrammeled, but that Congress has the power to remove the restrictions upon the State in dealing with imported articles of trade and to allow the States to pass laws regulating dealing in such articles, and this is all the Webb-Kenyon act purports to do, because the construction of that act is that it simply withdraws the protection of interstate commerce from intoxicating liquors when any such liquor is intended by any person interested therein to be received, etc., in violation of the law of the State. *Express Co. v. Kentucky,* U. S. Supreme Court (291) opinion filed 14 June, 1915.

To meet the decision in the *Leisy case,* the Wilson act of 1890 was passed by Congress, which provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This last act was declared to be constitutional in *In re Rahrer,* 140 U. S., 545, but in the subsequent case of *Rhodes v. Iowa,* 170 U. S., 412, while adhering to the decision in the *Rahrer case* as to the constitutionality of the act, it was held that the language "upon arrival in such State" meant after delivery to the consignee.

Speaking of these two cases and of the Wilson act, and Court said in *Vance v. Vanderook Co.,* 170 U. S., 428: "In the first of these cases the constitutional power of Congress to pass the enactment in question was upheld, and the purpose of Congress in adopting it was declared to have been to allow State laws to operate on liquor shipped into one State from another, so as to prevent the sale in the original package in violation of State laws. In the second case the same view was taken of the statute, and, although it was decided that the power of the State did not attach to the intoxicating liquor when in course of transit, and

until receipt and delivery, it was yet reiterated that the obvious and plain meaning of the act of Congress was to allow the State laws to attach to intoxicating liquors received by interstate commerce shipments before sale in the original package, and, therefore, at such a time as to prevent such sale if made unlawful by the State law."

In passing upon the enactment of the Wilson law in the case of *In re Rahrer,* the Court disposes of the objection to the Webb-Kenyon law that it is a delegation of power to the State, and that it is not a regulation of commerce because of want of uniformity, growing out of variations in the laws of the different States. The Court says: "In so doing Congress has not attempted to delegate the power to regulate commerce or exercise any power reserved to the States or to grant a power not possessed by the States or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, *whose uniformity is not affected by variations in State laws* in dealing with such property. . . . Congress did not use terms of permission to the States to act, but simply removed an impediment to the enforcement of the State laws in
(292) respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The principles seemingly deducible from these authorities are:

1. That prior to any legislation by Congress the right to sell in the original package was inherent in the shipment of intoxicating liquors from one State to another, and this right could not be interfered with by the State.

2. That this right can be withdrawn by Congress.

3. That it is within the constitutional power of Congress to subject intoxicating liquors to laws enacted by the States in the exercise of the police power upon arrival in the State.

4. That an act of Congress subjecting intoxicating liquors to the police laws of the State upon arrival in the State is not a delegation or grant of power to the State.

5. That such an act of Congress is a regulation of commerce.

6. That the uniformity of the regulation by Congress is not affected by the variations in the State laws.

7. That Congress has the power to remove the impediment of the protection of interstate commerce to the enforcement of State laws.

If so, the constitutionality of the Webb-Kenyon law has already been determined by the Supreme Court of the United States, and the fact that in the recent case of *Express Co. v. Kentucky* the opinion was based upon the construction of the act, treating it as valid, when the constitu-

tional question was directly raised, gives color to the belief that that Court regards the question as settled. Indeed, there is no real difference except in degree between the Wilson act and the Webb-Kenyon law, as both subject intoxicating liquors to the police power of the State, the first, when the shipment is delivered to the consignee, and the second, when it reaches the borders of the State; and when it was held that the Wilson act was constitutional, and that it was in itself a regulation of commerce, it would seem that the question as to the validity of the Webb-Kenyon law was foreclosed, because, as was said in *Securities Co. v. United States,* 193 U. S.: "The power of Congress to regulate commerce among the States and with foreign nations is the power to prescribe the rule by which commerce is to be governed, . . . that a sound construction of the Constitution allows to Congress a large discretion with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people, and, if the end to be accomplished is within the scope of the Constitution, all means which are appropriate which are plainly adapted to that end and which are not prohibited, are constitutional."

This construction gives effect to the commerce clause of the (293) Constitution and to legislation by the States, and is in accordance with the views of the founders of the Constitution, because, as was said in *Sherlock v. Alling,* 93 U. S., 99, and approved in *Plumly v. Massachusetts,* 155 U. S., 473, "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

If the Webb-Kenyon act is valid, it says in unmistakable language that the transportation of intoxicating liquors is prohibited when it is intended by any person interested to be received, etc., in violation of any law of the State into which the liquor is to be transported.

The consignee is a person interested in the shipment, and the statute of this State makes it unlawful to receive more than one quart of intoxicating liquors within fifteen days.

It follows, as the Webb-Kenyon law forbids the transportation of liquor when it is intended to be received in violation of the law of the State, and as the State statute forbids receipt, that receiving more than one quart in fifteen days is in violation of the law of the State, and therefore illegal, if the statute of the State is valid as an exercise of the police power.

This question was not decided, and, on the contrary, was expressly reserved, in *S. v. Williams,* 146 N. C., 618, the Court saying in that

case: "We do not hold that common carriers may not be forbidden to transport liquor into prohibition territory. That question is not before us, nor do we undertake to express any opinion regarding the effect of the Fourteenth Amendment upon the power of the State to deal with the manner of sale of liquor or of the power of Congress to legislate upon the question of interstate transportation."

The police power is one originally and always belonging to the States, and was not surrendered by them to the General Government.

In *United States v. Knight,* 156 U. S., 1, it is said: "It cannot be denied that the power of a State to protect the lives, health and property of its citizens and to preserve good order and public morals, the power to govern men and things within the limits of its dominion, is a power originally and always belonging to the States, not surrendered by them to the Government, nor directly restrained by the Constitution of the United States and essentially exclusive," and in *Jacobson v. Massachusetts,* 187 U. S., 11, speaking of the statute of Massachusetts, "The authority of a State to enact this statute is to be referred to what is commonly called the police power, a power which the State did not surrender when becoming a member of the Union under the Constitution."

"It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and
(294) property of the citizens, the power to govern men and things by any legislation appropriate to that end." 9 Ency. of U. S. Reports, 473.

"This power is, and must be, from its very nature, incapable of any very exact definition or limitation; upon it depends the security of social order, the life and health of the citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." *Slaughterhouse cases,* 16 Wall., 36.

If it is a power which belongs to the State and has not been surrendered, and if it may be exercised to conserve the peace, health, morals and safety of the people, the question is presented whether the use of intoxicating liquors is so threatening to the public welfare that its regulation and control comes within the scope of the legitimate exercise of the power.

The courts have not always moved as rapidly as the enthusiast might desire, because restrained by law, but they have spoken in no uncertain terms of the evils growing out of the liquor traffic, and have been insistent as to the necessity for restriction and regulation in the use of intoxicants, as will be seen by reference to the following cases: *Goddard v. Jacksonville,* 15 Ill., 589; *Beebe v. State,* 6 Ind., 542; *S. v. Crawford,* 42

A. R., 186; *Thurlow v. Commonwealth,* 5 How. (Mass.), 504; *S. v. City Council,* 42 S. C., 222; *Crowley v. Christensen,* 137 U. S., 86.

We quote from only three of these cases, and then only for the purpose of illustrating the idea that the courts recognize the excessive use of intoxicants as injurious to health, morals and the public safety, and, therefore, that their sale and use may be controlled by the State under its police power.

The Court says, in *Thurlow v. Commonwealth:* "It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use and abuse of ardent spirits."

In *Crowley v. Christensen,* 137 U. S., 86: "It still is the prolific source of disease, misery, pauperism, vice and crime. Its power to weaken, corrupt, debauch and slay human character and human life is not destroyed or impaired because it may be susceptible of some innocent uses, or may be used with propriety on some occasions. The health, morals, peace and safety of the community at large are still threatened, and, under the form of government established for this State, and for the Union of States of which it is a member, these are special subjects of local legislative cognizance."

In *S. v. City Council,* 42 S. C., 222 (20 S. E., 221): "We do not suppose there is a more potent factor in keeping up the necessity of asylums, penitentiaries and jails, and in producing pauperism and immorality throughout the entire country, than liquors."

The publications of the medical profession show that the mem- (295) bers of that profession generally concur in this view.

If, as we have undertaken to show, the regulation of the use is within the scope of the police power, is the statute of the State a reasonable exercise of that power? The means to be adopted by the State are largely within the legislative discretion.

"Where the methods have been devised by the State under the power to protect the property of its people from injury and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the State is entitled to accomplish." *Reid v. Colorado,* 187 U. S., 137.

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this Court can know but imperfectly, if at all." *Otis v. Parker,* 187 U. S., 606.

In *Munn v. Illinois,* 94 U. S., 113, the Court said: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

If considered without regard to the policy of the State in favor of prohibition, we would hold it an arbitrary and unwarranted interference with the right of the carrier to transport, and with the right of the consignee to receive, but when it is understood that the statute is but a means of enforcing the State policy of prohibition there seems to be such a reasonable relation between the two as justifies upholding the statute as a reasonable regulation.

The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced to sell, and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of evasion of the prohibition law that restrictions upon the right of delivery in the State are necessary to prevent illicit sales.

In *Mugler v. Kansas,* 123 U. S., the Court held that it was
(296) within the power of the State to prohibit the manufacture of intoxicating liquors for one's own personal use, and, if this may be done, why may not the State limit the quantity which may be received for use?

In this last case (*Mugler v. Kansas*), after discussing the extent of the police power, the Court says, with reference to its application: "Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of the ardent spirits. . . . And so, if in the judgment of the Legislature the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the country against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to

disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare."

Express Co. v. Whittle, 69 So., 652, in which the opinion was filed 17 June, 1915, by the Supreme Court of Alabama, is directly in point upon the question before us. In that case the statute before the Court was, in all essential particulars, like ours. It provides in section 12, "That it shall be unlawful for any person, firm or corporation, (1) to receive or accept delivery of, or to possess or to have in possession at any one time, whether in one or more places, and whether in original packages or otherwise, more than one-half gallon of spirituous liquors, or more than two gallons of vinous liquors, or more than five gallons of malted liquors, when in kegs, or more than sixty pints when in bottles, or more than one gallon of any other intoxicating or fermented liquors beyond those thus enumerated; or (2) to receive, accept (297) delivery of, possess, or have in possession more than one gallon of spirituous liquors, or four gallons of vinous liquors or more than ten gallons of malted liquors, including beer and ale, when in kegs, or one hundred and twenty pints in bottles, or more than two gallons of any other fermented or intoxicating liquors beyond those enumerated, within any four consecutive weeks," and the Court, without dissent, held the statute to be valid and constitutional as applied to a shipment for personal use, saying, in conclusion, what is pertinent in passing on our statute, "If the right at common law to manufacture intoxicating liquor for one's own personal use, out of one's own materials by the application of one's own personal effort, may be forbidden by appropriate legislation under the police power, as was expressly ruled in *Mugler v. Kansas, supra,* it can not be logically or soundly asserted that the receipt or possession of more than a specified quantity at one time may not be forbidden by statute, especially when the sale or other disposition of intoxicants is

forbidden in the State's effort to promote temperance and to suppress the evils of intemperance by visiting its power upon one of the means usually productive of intemperance, viz., the traffic therein, or, as has been before quoted from our *Marks* and *Carl cases, ante,* to remedy the evil present in 'the use of intoxicating liquors as a beverage.' The power confirmed in *Mugler v. Kansas* must necessarily comprehend the lesser manifestation of a like power by regulating the quantity to be received or possessed at one time in dry territory in the State. Furthermore, it would appear to be but the assertion of a self-evident truth to say that since one may be validly forbidden to sell his intoxicating liquors to another, that other may be validly forbidden to buy the article from him; and if one may be validly forbidden to sell and, necessarily validly forbidden to deliver the article, to another, that other may be validly forbidden to accept delivery. As to the seller, the prohibitions stated would operate upon him and upon his property, but not in the sense or with the effect of infringing any constitutional right or immunity (*Dorman's case, supra*); whereas in the latter case (the buyer) the prohibitions would operate in anticipation, qualifying his right, in the interest of the public welfare as determined by the authority (the lawmakers) with which the decision in such circumstances rests—to acquire a property interest in the article above a defined quantity at one time."

In 5 R. C. L., 778, the editor says: "Under the Webb-Kenyon act, however, it would seem that interstate transportation of intoxicating liquors has been subjected absolutely to the law of the place of consignment," and in Mod. Am. L., vol. 12, pp. 250-251: "The Webb act has not yet come before the Court. Although President Taft vetoed it on the ground of unconstitutionality, and, in the debates on its first and
(298) final passage over the veto, similar objections were made in Congress, it seems that the act is valid. It does not have so much of the appearance of delegation of power as did the Wilson act. In fact, it is a direct regulation by Congress prohibiting certain shipments and transportation in interstate commerce into certain regions to be determined by local conditions. Uniformity of regulation is not necessary, and even if it were, the act operates alike everywhere under like conditions. . . .

"This law is quite sweeping, and, if constitutional puts it completely within the power of a State to prevent the bringing in of intoxicating drinks. For example, not only can a State forbid 'boot-leggers' coming across the boundary afoot with liquor, but a resident of the State may be forbidden to bring a bottle of liquor home with him from outside the State."

We need not go this far to sustain the legislation of this State.

Express Co. v. Kentucky, supra, has no bearing on the validity of our statute, and is only important in so far as it is determinative of the meaning of the Webb-Kenyon law, the Court holding in that case as to interstate shipments that "such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the State wherein they are received."

The Kentucky statute does not purport to deal with the consignee, who is the "person interested therein." It operates only on the carrier by forbidding delivery, and does not say that it shall be unlawful for the consignee to receive, use or possess, and it could not, therefore, be held that the consignee, "the person interested therein," intended that the liquors should be received in violation of the law of the State, and in this is to be found the marked distinction between the statute of Kentucky and our statute, which saves the latter from condemnation.

We are, therefore, of opinion the judgments in the two actions must be affirmed, as in the first the plaintiff is demanding the delivery of one quart of whiskey within fifteen days after the receipt of a similar package, and in the second is seeking to compel the transportation of more than one quart, both being condemned by the statute.

Affirmed.

Cited: Skinner v. Thomas, 171 N. C. 101 (4g); *Pfeifer v. Drug Co.,* 171 N. C. 215 (1g, 2g, 3g); *S. v. Little,* 171 N. C. 806 (2f, 3f); *Thomas v. Sanderlin,* 173 N. C. 332 (3p); *Durham v. R. R.,* 185 N. C. 249 (3p); *Calcutt v. McGeachy,* 213 N. C. 8 (3p); *S. v. Ballance,* 229 N. C. 770 (3b).

DAVIDSON HARDWARE COMPANY v. DELKER BROTHERS BUGGY COMPANY.

(Filed 17 November, 1915.)

1. Vendor and Purchaser—Contracts of Sale—Stipulations—Right of Cancellation—Issues.

Where the purchaser sues for damages for the seller's breach of contract in failing to deliver certain merchandise, and the defendant relies upon a provision of the contract giving him the right to cancel it upon receiving information unfavorably affecting the plaintiff's credit, an issue is too restrictive in its scope which confines the question to the receipt of this unfavorable information by the plaintiff, and, under the evidence in this case, an issue was properly submitted which also presented the question whether the defendant canceled the order in consequence of such information if such had been received by it.

2. Vendor and Purchaser—Contracts of Sale—Right of Cancellation—Reasonable Time.

A contract for the sale and delivery of merchandise providing that the seller would have the right of cancellation after the acceptance of the order, implies that this right of cancellation must be exercised within a reasonable time and, ordinarily, before the time stated for the performance of the contract of delivery by the seller.

(299) APPEAL by defendant from *Lyon, J.*, at February Term, 1915, of DAVIDSON.

Civil action. Plaintiff sued for breach of contract by defendant in failing to ship 36 buggies. The case was here at Fall Term, 1914, and is reported in 167 N. C., 423. Defendant alleged that it failed to ship the buggies because of information received by it, after the order for them was given, which was unfavorable to plaintiff's credit, the contention being that this is a good defense by the terms of the contract. The contract was made 31 July, 1912. The first delivery of buggies was to be made 1 February, 1913, and the second 1 May, 1913, upon specifications to be furnished by 1 January, 1913. An agent of defendant went to Lexington, N. C., the place of delivery, and made up the specifications for 24 buggies of the lot some time before January, but no buggies were shipped, and plaintiff was thus deprived of all benefit under the contract, and was not able to procure buggies elsewhere until May, 1915, nor did it know that defendant had decided not to ship the buggies until February, 1915. An attachment was levied on a debt due to defendant by Smoak, McCrary & Dalton.

Defendant tendered the following issue: "Did defendant receive information affecting unfavorably the credit of the plaintiff?" The court declined to submit the issue as tendered, and submitted this issue instead thereof: "Did defendant receive information affecting unfavorably the credit of the plaintiff, and did it cancel said contract in consequence of said information?" Defendant excepted. The jury returned the following verdict:

1. What amount, if any, was plaintiff damaged by the failure of the defendant to ship the buggies, as alleged in the complaint? Answer: $350.

2. Did the defendant receive information affecting unfavorably the credit of the plaintiff, and did defendant cancel contract in consequence of such information? Answer: No.

3. Were Smoak, McCrary & Dalton indebted to the defendant at the time of the service of the attachment herein? Answer: Yes.

(300) The defendant requested the court to instruct the jury to answer the second issue "Yes," if they believed the evidence. The instruction was refused, and defendant excepted. There was also a motion

for a nonsuit, which was refused, and defendant again excepted. Judgment was entered upon the verdict and defendant appealed.

E. E. Raper and Phillips & Bower for plaintiff.
Walser & Walser for defendant.

WALKER, J., after stating the case: The question as to the damages recoverable was settled when the case was here before, and it is not again raised by the defendant. There is evidence in this record tending to show that defendant's failure to ship the buggies was not due to any information it had received unfavorable to the plaintiff's financial credit, if it had received the information at all. The particular stipulation is that "information affecting unfavorably the credit of the purchaser (plaintiff) shall give the seller (defendant) the right to cancel after acceptance." This, of course, means after acceptance of the order when the bargain had been struck, and it, further, evidently means that this right of cancellation shall be exercised before the time for performing the contract or delivering the buggies has arrived. It surely could not mean, or, at least, that was not the intention of the parties, that the option to cancel could be exercised at any time, or indefinitely, but it was the understanding and meaning of both parties that if, from information received by the seller, he should be made to suspect or doubt the financial responsibility of the buyer, he could revoke his accepance of the order, with this clearly implied provision that this must be done within a reasonable time, which plaintiff contends must be before the day of performance has come and gone, and accompanied by notice to the buyer that he had rescinded it, so that he might make other arrangements to supply himself with buggies, as otherwise he might be greatly prejudiced. It is further contended that this must especially be true as to contracts of this kind, where the buggies were bought for delivery at a specified time, in order to get the advantage of the season, when the trade, or the opportunity to sell them again and realize the profit would be at its best. For this contention, the plaintiff's counsel relied on this passage from 35 Cyc., p. 150: "The seller must rescind, if at all, within a reasonable time after acquiring knowledge of the facts justifying rescission. Whether the seller has exercised this right reasonably is generally a mixed question of law and fact to be submitted to the jury, but if the delay is for such period as to be unquestionably without cause, the court may so declare as a matter of law." But we need not decide whether, as a matter of law, the defendant was too late in exercising the right of rescission, as the question was submitted to the jury in another view, and they were directed to find whether the option to rescind had been exercised by the defendant because of (301)

the existence of the cause or ground which entitled it to cancel the contract; not alone whether the latter had received information damaging to plaintiff's credit, but whether, having received it, it acted upon it or was influenced by it in making the rescission, or by some other groundless cause. Under full and correct instructions, the jury have found this issue against the defendant. The issues were proper in form and substance, and enabled defendant to present its defense, as stated in the answer, in every aspect, and when this is the case they are sufficiently comprehensive. *Tuttle v. Tuttle,* 146 N. C., 484; *Lloyd v. Venable,* 168 N. C., 531; *Barefoot v. Lee, ibid.,* 89; *Zollicoffer v. Zollicoffer, ibid.,* 326.

The fourth assignment of error is not in the required form, as it does not, in itself, point out the error so that we can see on its face what the particular error is. Errors cannot be assigned by merely referring to exceptions by number, without stating in any way their nature. *Barringer v. Deal,* 164 N. C., 246; *Spruce Co. v. Hunnicutt,* 166 N. C., 202. But there is no merit in the assignment, as there was evidence to sustain the finding of the jury. The motion to nonsuit was properly overruled for the same reason, as there was evidence to support the verdict. The special provision in the contract, that the defendant might cancel it at its election when it had received information impeaching the plaintiff's financial credit, can be construed, we think, to mean but one thing, which is that the information must be the cause of defendant's rescission of the contract, or must have induced such action on his part. The court was therefore right in amending the issue which was tendered by the defendant, as it did, for it was clearly not intended that the receipt of such information alone should automatically rescind the contract, but that it should be a ground for its avoidance if the defendant was influenced thereby to exercise the option granted by its terms.

The case was properly tried and there is no reason for a reversal.

No error.

G. A. P. BOWMAN v. FIDELITY TRUST AND DEVELOPMENT COMPANY ET AL.

(Filed 1 December, 1915.)

Instructions—Contract—Breach—Testimony of One Witness.

Where suit is entered for damages for breach of a contract of employment for a year, against a corporation which denies liability on the ground that the contract had been terminated by the mutual consent or agreement of the parties, it is reversible error for the trial judge to charge the jury that if they believed the testimony of an officer of the company, which

was capable of the construction that the defendant had wrongfully breached its contract, to find the issue in plaintiff's favor, there being other evidence in behalf of the defendant's contention.

APPEAL by defendant from *Rountree, J.*, at May Term, 1915, of (302) NEW HANOVER.

Civil action. There was allegation, with evidence, on the part of plaintiff, that in May, 1912, he entered into a contract for a year's service in insurance work for defendant company at a specified compensation; that he was wrongfully discharged during the continuance of the contract, and, having waited till the year expired, sued for damages for breach, to wit, the contract amount, less amount earned by him during the year, etc.

Defendant denied a breach of the contract and alleged, further, that the contract between the parties had been voluntarily surrendered and canceled and all rights growing out of same satisfactorily adjusted, and offered evidence to support its position.

On issues submitted the jury rendered the following verdict:

1. Did the defendant break its contract with the plaintiff, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,600, minus $1,750; net, $1,850.

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

Kenan & Stacy for plaintiff.

C. D. Weeks and J. D. Bellamy & Son for defendant.

HOKE, J. In the charge of his Honor on the first issue, he said, among other things: "The court charges you that if you believe the evidence of Mr. Chadwick, who is an officer of the company, familiar with its affairs, you will answer that issue 'Yes,' irrespective of the testimony of the plaintiff, who also says that the contract was breached by the defendant."

Again, after a very careful statement of the position of the parties plaintiff and defendant on the other features of the case, he says: "Remember the court charges you if you believe Chadwick's testimony, you will answer the first issue 'Yes,' " etc. True, this witness, Chadwick, was an officer of defendant company and had testified in its behalf, but, in our opinion, while the permissible, it is not at all the necessary interpretation of the witness's testimony that there had been a wrongful breach of the contract on the part of the defendant. Some portions of his testimony are capable of the construction that the contract had been

surrendered and canceled by mutual consent of the parties, as defendant contended. Apart from this, there were other witnesses who testified for defendant, and their statements tended to show there had been no wrongful breach of the contract within the meaning of the issue, and in singling out this witness and making the case depend in this way (303) on his evidence alone, we are of opinion that, under our decisions, the charge in this respect, should be held reversible error. *Cogdell v. R. R.*, 129 N. C., 398; *Long v. Hall,* 286-293; *Jackson v. Comrs.,* 76 N. C., 282; *Anderson v. Steamboat Co.,* 64 N. C., 399.

This will be certified, that the cause may be submitted to another jury. New trial.

Cited: Bowman v. Development Co., 183 N. C. 250 *S.c.; S. v. Rhinehart,* 209 N. C. 154 (g); *Halsey v. Snell,* 214 N. C. 212 (f).

E. S. REID ET AL. v. M. A. ALEXANDER ET AL.

(Filed 8 December, 1915.)

Courts—Wills—Advice—Appeal and Error.

The courts will not entertain jurisdiction to construe a will merely to advise the parties as to the interests they will take thereunder. *Littleton v. Thorne,* 93 N. C., 71, cited and applied.*

APPEAL by both parties from *Lane, J.,* at February Term, 1915, of MECKLENBURG.

Action for the construction of a will.

Cameron Morrison, S. C. Dockery and J. H. McClain for plaintiff.
Cansler & Cansler for defendant Alexander.
Pharr & Bell for defendants Nesbit.

ALLEN, J. This is an action between the devisees and legatees of John O. Alexander for the purpose of asking the advice and opinion of the court as to their respective interests under the will and for a construc-

*In this case, on the question of the identity of the Hudson and the Home place, *Branch v. Hunter* 61 N. C., 1, is cited; on the presumption of testacy and under the language of the will, the Hudson place goes to the residuary legatees; the third item of the will presents a case of latent ambiguity, admitting parol evidence; and the same applies to the William Lee place, mentioned in the codicil, the question being as to the testator's intent under the evidence, and not alone whether there was such a place.

tion of the will, and, as such, it cannot be entertained, for want of jurisdiction in the Court.

It has been so held since the case of *Tayloe v. Bond,* 45 N. C., 14, decided in 1838, and one of the latest cases upon the subject is *Heptinstall v. Newsome,* 148 N. C., 504, in which case an action brought for the same purpose was dismissed.

In *Little v. Thorne,* 93 N. C., 71, the doctrine is stated clearly and accurately by *Ashe. J.* He says: "The action seems to be predicated upon the general idea that a court of equity has a sweeping jurisdiction in reference to the construction of wills, which *Chief Justice Pearson* said, in case of *Tayloe v. Bond,* Busb. Eq., 5, was an erroneous idea. In that case, the learned judge, in his well-considered (304) opinion, has given a very clear exposition of the jurisdiction of a court of equity in the construction of wills, and from it we deduct the following rule as established: That the jurisdiction in matters of construction is limited to such as are necessary for the present action of the court, and upon which it may enter a decree or direction in the nature of a decree. It will never give an abstract opinion upon the construction of a will, nor give advice, except when its present action is involved in respect to something to be done under its decree. That it will not entertain an action for the construction of a devise, for the rights of devisees are purely legal, and must be adjudged by the courts of law. The only exception to this is where a case is properly in a court of equity under some of the known and the accustomed heads of jurisdiction, and a question of construction incidentally arises, the court will determine it, it being necessary to do so in order to decide the cases—as, for instance, in actions for partition, or for the recovery of legacies where devises and legacies are so blended and dependent on each other as to make it necessary to construe the whole in order to ascertain the legacies, because the court, having jurisdiction over legacies, must take jurisdiction over all matters necessary to its exercise.

"The advisory jurisdiction of the court is primarily confined to trusts and trustees. *Alsbrook v. Reid,* 89 N. C., 151, and cases there cited. Hence the court will advise executors, who are regarded as trustees, as to the discharge of the trusts with which they are clothed, and, as incident thereto, the construction and legal effect of the instrument by which they are created, when a case is presented where the action of the court is involved as distinguished from an *abstract opinion. Simpson v. Wallace,* 83 N. C., 477; *Tayloe v. Bond, supra.* But in the latter case it is said there is no ground upon which to base a jurisdiction to give advice to an executor in regard to his future conduct or future rights or to allow him to 'ask the opinion of the court as to the future rights of a legatee,' as, for instance, 'who will be entitled when a life estate

expires.' But the advice is only given upon an existing state of facts upon which a decree or some direction of the court in nature of a decree is solicited."

If the questions discussed on the oral argument and in the briefs were before us for decision we would hold:

1. That the Hudson tract is no part of the home place, and does not pass under the third item of the will, on the authority of *Branch v. Hunter,* 61 N. C., 1.

2. That, having in mind the presumption that the testator intended to dispose of all of his property, and that he says in his will that he desires his land to be divided among his children as declared in (305) his will, and that the words in the residuary clause of the will, "or otherwise," would be without meaning if a contrary construction should be adopted, the Hudson place passes under the fourth item of the will to the residuary legatees and devisees.

3. That the description in the third item as "my home place and on which I reside" presents a case of a latent ambiguity, and that parol evidence is admissible for the purpose of identification, and that this question has been properly tried.

4. That the description in the codicil of 17 December, 1903, as the "plantation known as the William Lee place containing about one hundred acres, more or less," presents the same question, and that this has not been properly tried, in that the question for determination under the evidence was what land the testator intended to devise by the description, and not alone whether there was a place known as the William Lee place.

There is evidence that William Lee formerly owned a tract of land of 268 acres; that the testator acquired 148 acres of this land in 1894, and the remainder, 120 acres, in 1902; that he had a line surveyed cutting off a part of one of these tracts and adding it to the other on which M. A. Alexander lived, and making this part 185½ acres, and other evidence on the question of identification.

Action dismissed.

Cited: Herring v. Herring, 180 N. C. 168 (f); *Bank v. Alexander,* 188 N. C. 671 (b); *Mountain Park Institute v. Lovill,* 198 N. C. 645 (b); *Finley v. Finley,* 201 N. C. 4 (f); *Cannon v. Cannon,* 225 N. C. 620 (f).

L. A. CARMON v. R. C. DICK ET AL.

(Filed 8 December, 1915.)

1. Easements—Way of Necessity.

Where one conveys a part of his estate he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which were reasonably necessary for the use of that part.

2. Same—Character of Use.

To create an easement or way of necessity over a part of the estate conveyed, formerly used by the owner before the severance of the estate for the benefit of the whole, it is required that there must be a separation of the title; that the former use of the way which gives rise to the easement shall have continued for so long a time and so obviously, or manifestly, as to show that it was meant to be permanent, and that it was necessary to the beneficial enjoyment of the land granted.

APPEAL by plaintiff from *Lyon, J.*, at March Term, 1915, of GUILFORD.

Civil action. Plaintiff alleged that he was entitled to an easement or right of way over a certain old and well-established private road or way from his own lands to the public road from the south side (306) of the county of Guilford to Gibsonville, and that the same had been used for many years as a private way by him and those under whom he claims, and he had so used the same adversely and under a claim of right. He also alleged that he was entitled to the said right, as one of necessity, he having purchased his tracts of land from the former owner of all the land, including the road or way, and being so surrounded by the lands of his grantors and others that he had no way out to any public road, and, besides, that the tracts he owns were sold to him by the owner of all the lands with reference to the said right of way, which had been laid out for many years and as a private road to a public highway, and that he and his immediate grantor, Joseph W. Foust, were induced to buy by reason of that fact, under the belief that the easement passed to them with the land, and, therefore, they are entitled to this right of way by estoppel.

The evidence tended to show that Daniel Foust was the owner of all that land "known as the home place." On 9 June, 1881, he conveyed a part of the said land, three hundred acres, to Joseph W. Foust. While Daniel Foust owned all the land, and before the date of his conveyance to Joseph W. Foust, he opened and used the road over which the plaintiff claims an easement, and which passed over his land and that part of it conveyed to Joseph W. Foust, and it was used as a road or private way

continuously thereafter until the defendant built a fence across it and plowed the ground, and thereby completely obstructed it. The plaintiff claims his title to one part of the land, containing eighty-seven and one-half acres, by deed from Joseph W. Foust and others, dated 3 February, 1903, and to the other part, containing about ten acres, by deed dated 22 May, 1913, from J. B. Minor, who was appointed commissioner to sell the same in a partition proceeding between the heirs of Joseph W. Foust. This deed grants also "the right of egress, ingress and regress over said road bounding the above described property on the north, and so far as the grantor herein has authority to convey the same."

At the close of the evidence the presiding judge ordered a nonsuit, and the plaintiff appealed.

King & Kimball for plaintiff.

John A. Barringer for defendant.

WALKER, J., after stating the case: It seems to us that there was some evidence in this case upon which the plaintiff might have recovered. The rule is said to be general that, where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of
(307) that part. Jones on Easements, sec. 129; *Stone v. Burkhead,* 169 S. W., 489. The doctrine is so well stated in *Irvine v. McCreary,* 108 Ky., 495 (56 S. W., 966), with a full citation of authorities, that we cannot do better than to reproduce here what is there said, quoting, as the Court does, from the text-books and cases:

"It may be considered as settled in the United States that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general ownership. It is said in Kent Comm., 467: 'Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. This is the case with a right of way or other easement appurtenant to land. . . . And, if a house or store be conveyed, everything passes which belongs to and is in use for it, as an incident or appurtenance.' Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there

arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made. The rule of the common law on this subject is well settled. The principle is that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed, upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the (308) servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective party."

This fairly and accurately states the doctrine as it has been finally settled by the authorities. See, also, *Stone v. Burkhead,* 169 S. W., 489; *Burwell v. Hobson,* 12 Grattan (Va.), 322; *Lebus v. Boston,* 92 Am. St., 333; *Feitler v. Dobbins,* 104 N. E. (Ill.), 1088. Three things are essential to the creation of an easement upon the severance of an estate, upon the ground that the owner before the severance made or used an improvement in one part of the estate for the benefit of another. First, there must be a separation of the title; second, it must appear that before the separation took place the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. An easement which is apparent and continuous, such as a drain or other artificial watercourse, a thing which is continuous in its service, and which does not require any active intervention of the owner for its continuance, and can always be seen or known on careful inspec-

tion, will pass on the severance of two tenements as appurtenant, without the use of the word "appurtenances"; but an easement which is not apparent and noncontinuous, such as a right of way, which is enjoyed at intervals, leaving no visible sign, in the interim, of its existence, will not pass unless the grantor uses language sufficient to create the easement *de novo*. Jones Easements, sec. 145; *Kelly v. Dunning*, 43 N. J., Eq., 62; 26 Pa. St., 438. It was said by *Justice Earle* that there is a distinction between an easement, such as a right of way or easement used from time to time, and an easement of necessity, or continuous easement, which the law recognizes, and it is clear that upon a severance of tenements an easement used as of necessity, or in its nature continuous, will pass by implication of law without any words of grant; but with regard to an easement which is used from time to time only, it will not pass, unless the owner, by appropriate language, shows an intention that it should pass. *Polden v. Bastard*, 4 B. & S., 258 (S. C. L. R., 1 Q. B., 156). A way of necessity is founded upon an implied grant, the necessity of itself not creating the right; but being only a circumstance resorted to for the purpose of showing the intention of the parties, and thereby raising the implication of a grant. This right is created by the change of ownership of a portion of an estate, the latter having attached to it, by construction, as an incident, a right of way over the ungranted portion, this being presumed to have been the intention of the parties.

(309) Jones Easements, sec. 304, thus states this view: "This is an application of the maxim that one is always understood to intend, as an incident, to grant whatever is necessary to give effect thereto which is in the grantor's power to bestow. The rule applies when there has been a severance of the property, one portion of which has been rendered inaccessible except by passing over the other or by trespassing on the lands of a stranger. When a landowner conveys a portion of his lot the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall, for like reason, prove useless to the grantor. This species of right of way, therefore, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant as indicative of the intention of the parties."

As to what should be the degree of necessity in order to create this right by implication based upon the presumed intention of the parties, it was said in *Kelly v. Dunning, supra*, that the right must be necessary to the beneficial use of the land granted or retained, and to its convenient and comfortable enjoyment, as it existed at the time of the grant; this rule being deemed as eminently reasonable and just, and its adop-

tion as essential, that full effect may be given to the principle of which it is an adjunct. Citing as supporting authorities *Ewart v. Cochrane,* 7 Jur. (N. S.), 925; *Pyer v. Carter,* 1 Hurl. & Norm., 916. It has been said that there is a tendency in recent cases to regard a way as a continuous and apparent easement, or one enjoyed without requiring the active intervention of the party entitled to it, as a drain, and to attach no special importance to the fact that it is used only from time to time, according to one's will and pleasure. Jones Easements, sec. 264, but we need not consider this view, as we are of the opinion that there is evidence in this case tending to show an easement of necessity over the road in question. Nor need we inquire whether there is some evidence of adverse user of the road for twenty years or more by the plaintiffs and those under whom they claim, within the rule stated in *Snowden v. Bell,* 159 N. C., 497, as it is quite sufficient to dispose of this appeal that there is one view of the evidence, when construed most favorably for the plaintiff, as it should be, under which he might have recovered, the court having ordered a nonsuit. The parties claim under a title derived from a common source, Daniel Foust, who once owned the entire tract of land and conveyed a part of it to Joseph W. Foust, under whom the plaintiff derives his title, and the defendants trace their title back to Daniel Foust through *mesne* conveyances from his executor. We do not hold that plaintiff is entitled to the right of way, as matter of law, but simply that there was some evidence upon which he was entitled to recover. In addition to the authorities above cited, we (310) may add another, *Clark v. Gaffney,* 116 Ill., 362, and also 14 Cyc., 1169 to 1176, and also 1181, where the subject is fully discussed and the authorities supporting the text are collected in the notes.

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

New trial.

Cited: Meroney v. Cherokee Lodge, 182 N. C. 743, 745 (f); *White v. Coghill,* 201 N. C., 423 (d); *Ferrell v. Trust Co.,* 221 N. C., 435, 436 (f).

COUNTY OF GUILFORD ET AL. v. W. C. PORTER ET AL.

(Filed 8 December, 1915.)

1. Easements—County—Deeds and Conveyances—Reservations—Reconveyance—Release.

A deed by a county to lands adjoining its courthouse square upon agreement that the land at a certain location shall forever be kept open

as vacant and unoccupied ground, except such obstruction as may be made by shade trees planted thereon, extends the benefit of the reservation of its use only to the property conveyed, and not to other property differently situated and not adjoining, owned by the grantee; and where the property thus conveyed has since been acquired by the county, the reconveyance in fee simple releases the easement created under the conveyance made by the county.

2. Easements—Deeds and Conveyances—Reservations—Public Squares—Courthouse Squares—Counties.

A conveyance to a county of a lot adjoining its courthouse square, reserving an easement therein that the "lot herein conveyed" shall be used by the county "as a public square," and if any building inconsistent therewith shall be erected "thereon" the grantor, his heirs and assigns, "may enter upon the lands herein conveyed" and remove any building thereon inconsistent with its use as a public square: *Held*, no restriction is therein imposed upon the county in the use of the adjoining square, whether existing at the time or thereafter acquired by it, and the easement is preserved intact so long as the land conveyed is used as a "public square," not necessarily a part of the courthouse square.

3. Easements—Counties—Statutes—Contracts—Deeds and Conveyances—Reservations.

The Legislature authorized Guilford County to purchase additional adjoining lands to the courthouse square, reciting that it was for the purpose "to lessen the danger from fire": *Held*, no easement arises except from the contract of the parties, and in this case none could be imported into the conveyance of land to the county in favor of the grantor merely by virtue of the recital of the act, for an easement is never inferred in favor of a grantor, but must be expressly reserved in the conveyance.

APPEAL by plaintiff from *Justice, J.*, at September Term, 1915, of GUILFORD.

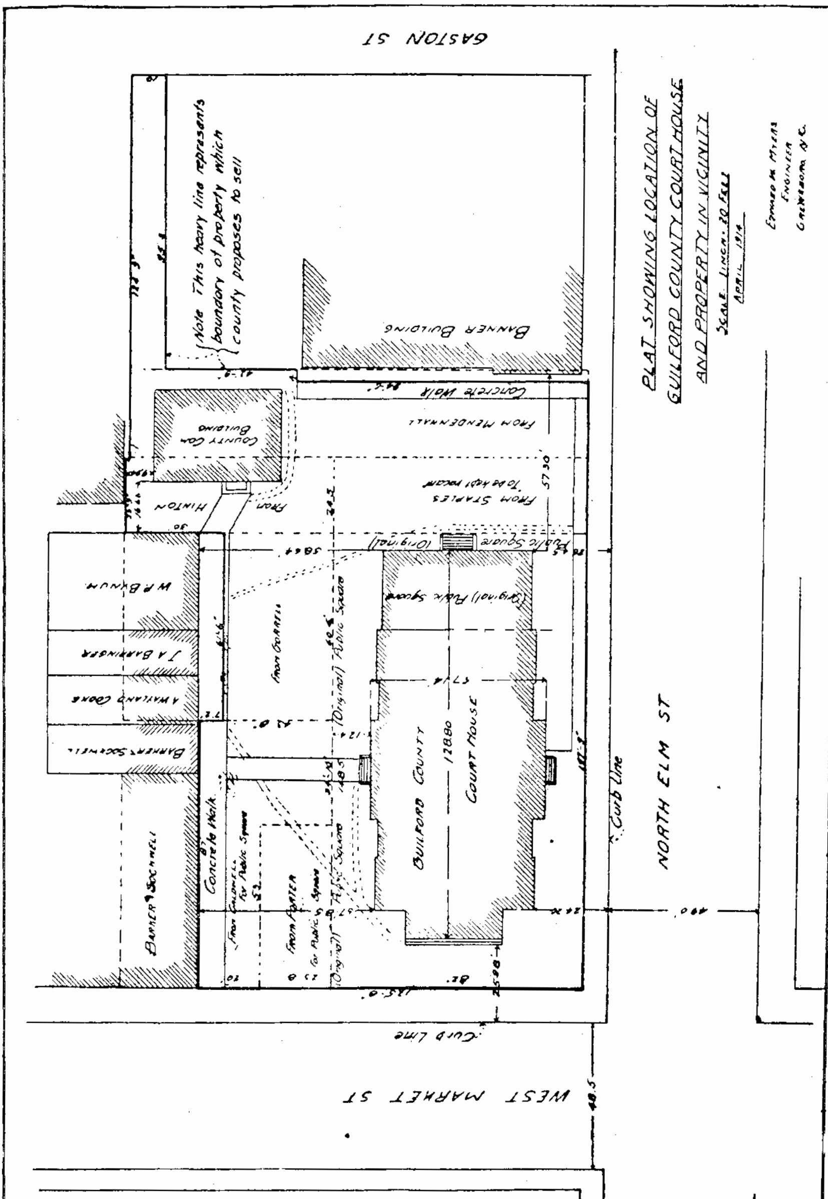
This action was brought by the county to remove an alleged cloud upon title on that portion of the courthouse square which was acquired in 1873 from Porter, Caldwell, Gorrell, Hinton and Staples. The case was before us, *Guilford v. Porter*, 167 N. C., 366. To the judg-
(311) ment entered on the opinion from this Court the plaintiff excepted and appealed.

John N. Wilson for plaintiffs.

Manly, Hendren & Womble, A. Wayland Cooke, R. W. Harrison and A. M. Scales for defendants.

CLARK, C. J. The county of Guilford purchased the property now known as the courthouse square in Greensboro from several persons. On 28 June, 1858, it purchased from Solomon Hopkins the ground upon which the present courthouse stands. By ch. 16, Laws 1872-1873, the

(312)


PLAT SHOWING LOCATION OF
GUILFORD COUNTY COURT HOUSE
AND PROPERTY IN VICINITY
GASTON ST
WEST MARKET ST
NORTH ELM ST
Note This heavy line represents boundary of property which county proposes to sell
BANNER BUILDING
Concrete Walk
FROM MENDENHALL
FROM STAPLES
HINTON
W R BYNUM
J A BARRINGER
A WAYLAND COOKE
BANNER & SOCKWELL
GUILFORD COUNTY
COURT HOUSE
Curb Line
Concrete Walk
12880
57.30

commissioners of Guilford were authorized to build a new courthouse and to enlarge the public square and, for that purpose, to purchase additional real estate surrounding said courthouse in order to lessen the danger from fire.

Pursuant to said act a deed was executed to the county by A. A. Hinton 1 February, 1873, for that portion of the present square marked on the map, "from Hinton." This deed was in fee simple and mentioned no easement of any kind. On 3 February, 1873, the county purchased the lot north of the Hopkins purchase, marked on the plat, "from Staples," and a deed in fee simple was executed to the county therefor, the deed to this lot stating that part of the consideration therefor was the conveyance by the county of a certain piece of land in exchange therefor, and on the same day the county of Guilford conveyed to Staples the lot just north of the property conveyed to the county by him, to wit, the lot marked on the map, "from Mendenhall," and in this deed by the county was the reservation that the county agreed that the "lot or parcel of land lying between said brick building and the courthouse on which formerly stood the office of C. B. Mendenhall shall forever be kept open as vacant and unoccupied ground, except such obstructions as may be made by shade trees thereon planted, and they shall not be planted within twenty feet of said brick building, and then only in such manner as will leave free ingress and egress to said brick building on the south side thereof."

This lot has since been purchased by the county from W. P. Bynum before this action was brought, and a deed therefor has been executed to the county in fee simple. Neither the lot purchased by the county from Staples nor the lot exchanged to Staples and since reconveyed by his assignee, Bynum, to the county, adjoins any property of the defendants, nor did it adjoin any property of W. C. Porter and W. A. Caldwell.

On 4 February, 1873, the county of Guilford purchased from Ralph Gorrell the tract marked on the map, "from Gorrell," and obtained a deed in fee simple therefor, with no condition or easement mentioned therein.

On 5 February, 1873, the county purchased from W. C. Porter the lot marked on the map, "from Porter," and in said deed was a
(313) provision that said lot "shall be used by the said party of the second part as a public square and be forever kept open for that purpose, and should any building or structure of any character inconsistent with said purpose be erected *thereon* the said party of the first part, his heirs or assigns, may enter *upon the land herein conveyed* and abate and remove any and all buildings or any parts of buildings inconsistent with its use as aforesaid."

On 5 February, 1873, the county purchased from W. A. Caldwell the lot marked on the map, "from Caldwell," and in said deed was the same provision as that contained in the deed from W. C. Porter.

On 5 February, 1873, the county of Guilford conveyed to W. A. Caldwell in fee a portion of the land purchased from Gorrell, to wit, the western portion of the tract marked on the map, "from Gorrell" and which is now the eastern half of the lots of the defendants Bynum, Barringer and Cooke, east of the dotted line on the map. This deed was in fee simple, and in it there was no mention of an easement, and there was none, as already stated, in the conveyance from Gorrell to the county.

On 7 June, 1911, the county acquired, as above stated, from W. P. Bynum, who held by mesne conveyances from Staples, a fee-simple deed for the lot marked on the map, "from Staples."

The defendants Barker and Sockwell acquired title to the two lots marked in their names on the map by mesne conveyances from W. C. Porter. The deed from Porter to his first grantee, Sykes & Son, was executed 1 October, 1874, and made no mention of an easement.

The defendant A. W. Cooke acquired title to the lot marked on the map with his name by mesne conveyances from W. A. Caldwell. The deed from said Caldwell to his first grantee, L. M. Scott, is dated 12 May, 1873, and makes no mention of an easement.

The defendant W. P. Bynum acquired title to the lot marked on the map in his name by mesne conveyances from W. A. Caldwell. The deed from said Caldwell for this lot to his first grantee, Scales & Scales, is dated 9 June, 1873, and makes no mention of any easement.

The defendant J. A. Barringer acquired title to the lot marked on the map in his name by mesne conveyances from W. A. Caldwell. The deed from said Caldwell for this lot to the first grantee, John W. Payne, is dated 13 September, 1873, and makes no mention of any easement.

The conditions or easements contained in the deed of the county to Waller R. Staples were intended for the benefit only of the property conveyed by that deed, and this Court did not intend to extend these conditions or easements to the property of the defendants which were never owned by said Staples and which do not adjoin any land ever owned by him. The conveyance back to the county by W. P. Bynum in fee simple of the lot which the county had conveyed to (314) Staples released the easement set out in the deed from the county to Staples, which is for the lot marked on the map, "from Mendenhall."

The eastern half of the lots of Wayland Cooke, J. A. Barringer and W. P. Bynum (except a very small strip at the south end of the Cooke lot) is held under mesne conveyances from Gorrell, who conveyed to

the county in fee without easement, and the county conveyed to W. A. Caldwell, without easement, who in turn conveyed without easement.

It follows from the above statement that the only property which the county owns within its present square on which there is an easement is that which is marked "from Porter" and "from Caldwell," east of the Barker and Sockwell line. When this case was here before the county contested the validity of the reservation of an easement by Porter and Caldwell, and that it ran with the land. We held against the county on this, but did not pass upon the extent of the easement. The easement reserved in these two lots (and there is no reservation in the other conveyances) is very explicitly stated in the deeds from W. C. Porter and W. A. Caldwell to the county 5 February, 1873, *i.e.*, *"The lot herein conveyed"* shall be used by the county "as a public square," and if any building inconsistent therewith shall be erected *"thereon"* the grantor, his heirs and assigns, "may enter upon *the land herein conveyed"* and remove any buildings thereon inconsistent with its use as a public square. There is no easement in favor of Porter and Caldwell reserved in, or restrictions imposed upon, the use of the adjoining square, whether already owned or thereafter to be purchased by the county. So long as the county uses these two lots as "a public square" the easement is intact. There is no obligation even in the conveyance that these lots should be a part of the courthouse square.

The recital by the Legislature, as one of the motives for the act authorizing the purchase of additional land for courthouse purposes, "to lessen the danger from fire," can not be imported into these deeds as an easement. An easement arises from the contract of the party. Otherwise, whenever a town, county, or the State shall purchase property for a public purpose it will become inalienable under penalty of paying the adjacent proprietors damages in case the public interests shall require a sale of the property. Here there was no stipulation giving the grantors of these two lots any easement in light or space as to the courthouse square any more than the grantors possessed such right in regard to the other adjoining lot-owners. The only stipulation was that the lots conveyed by Porter and Caldwell should be kept open for a public square. This did not give the grantors an easement in the courthouse square already owned by the county, but reserved to them, their heirs and assigns, that these lots should be an open space, with
(315) provision for an entry on these two lots to remove any buildings thereon which should be inconsistent with the use of these lots as a public square.

It is because there was no other easement than in these two lots themselves that in the first grants made thereafter of land on the west of these lots by Porter to Sykes & Son and L. M. Scott, and in the first

grants from Caldwell, which were to Scales & Scales and John W. Payne, under which, by mesne conveyances, the other defendants claim, there was no mention of an easement, for the very simple reason that these other lots had no easements. The only easement reserved was, as specifically stated in the grants to the county, in the two lots conveyed to the county that they should not be built upon except for purposes consistent with their use as a "public square"—not necessarily a courthouse square. There is no contract that they shall be used in connection with the courthouse square, and a deed is to be construed most strongly against the grantor. An easement is never to be inferred, but must be expressly reserved.

The court below erred in the judgment rendered, and it will enter its judgment in accordance with this opinion.

Reversed.

Cited: Guilford v. Porter, 171 N. C. 359 *S.c.; Barker v. Ins. Co.* 181 N. C. 268, 269, 270 *S.c.; Guilford County v. Bynum,* 181 N. C. 289, 290 *S.c.*

FAIRBANKS, MORSE & COMPANY v. TWIN CITY SUPPLY COMPANY.

(Filed 24 November, 1915.)

1. Vendor and Purchaser—Contracts—Inherent Defects—Repair—Breach of Warranty—Damages.

Where an engine is sold to run a certain kind of machinery and is guaranteed to be of good material, and that "any parts proving defective within one year after date of shipment will be replaced free," if investigation shows that is made necessary by inherent defects of material or workmanship, but the seller assumes no liability for damage or delays caused by such defective material or workmanship, the terms of the guarantee will be construed to reasonably effectuate the intention of the parties, which is, that where the defects of the engine are discovered in its use, and the seller has attempted and failed to remedy the defects, so that the engine thereafter fails to do the work contemplated, the terms of the guarantee excluding the liability will apply only to the original defects, and damages sustained by the buyer for failure of the seller to properly remedy them are recoverable under the terms of the contract.

2. Vendor and Purchaser—Contracts—Defects—Repair—Warranty—Reasonable Time.

Where the contract of sale of an engine is against inherent defects, which the seller agrees to remedy after discovered, upon notice from the buyer, and such defects are discovered and notice duly given, the warranty, by its terms, implies that the seller will make good his guarantee within a reasonable time.

3. Same—Waiver.

Where the seller of an engine guarantees that he will remedy any inherent defects thereof upon notice, and, after receiving such notice, he attempts to remedy them and fails therein, he waives the stipulation for "substituting good for bad parts," and the buyer is then remitted to his general right to recover the damages he has sustained by reason of the breach of the contract.

4. Same—Principal and Agent—Ratification.

Where the seller of an engine has failed to make good certain parts thereof which have been proven inherently defective, and which his guarantee provided that he would do, but without further responsibility, testimony on behalf of the buyer that the credit man of the seller induced him to give the note sued on and make a cash payment, under promise that the defects existing would shortly be remedied; that the seller received the money and the note with knowledge of the transaction, is evidence of his waiver of the stipulations in the warranty and a ratification of the act of his agent.

(316) APPEAL by defendant from *Justice, J.*, at June Term, 1915, of ROCKINGHAM.

Civil action. The four actions were originally brought in a justice's court on notes given by the defendant for a 20-horse-power oil engine No. 132538. The notes were dated 9 June, 1914: one for $150, due 1 August, 1914; another for $128.29, due 1 September, 1914, and two for $100 each, due respectively on 1 October, 1914, and 1 November, 1914, and bearing 6 per cent interest from date. All were given under the following contract:

August 5, 1913.

TWIN CITY SUPPLY CO., LEAKSVILLE, N. C.

Items: We hereby propose to furnish and deliver f. o. b. cars at factory as follows: Less 35c. cut freight allowance, one 20-horse-power oil engine complete as per specifications, catalogue 91-A, outfit 1255, except that pulley shall be 16 diam. by 16 face.

Guarantee: The machinery herein specified is guaranteed by us to be of good material, in workmanlike manner; any parts proving defective within one year from date of shipment will be furnished free of charge f. o. b. cars, factory, provided investigation shows are made necessary by inherent defects of either material or workmanship of the machinery furnished; but we assume no liability, nor will we be responsible for damage or delays caused by such defective material or workmanship, nor will we make any allowance for repairs or alterations made by others, unless same are made with our written consent.

Ship to Twin City Supply Co., at Leaksville, N. C., via Southern Railway from Beloit.

Price: We propose to furnish the property as specified herein for the sum of $675, to be paid at our office, shown herein as follows: Terms: $175 upon installation, balance, $500, in four equal payments three months each after shipment. In event of your failure to make payment of any portion of the purchase price when due the whole (317) unpaid balance of the purchase price shall, at our election, thereupon become due. All deferred payments shall be evidenced by notes bearing interest at the rate of 6 per cent per annum from date. (Provisions here for reserving title as security.)

It is a further condition of this proposal that the acceptance of the property when delivered shall constitute a waiver of all claims for damages by reason of any delay, and that you will make good to us any loss or damage to said property caused by fire or otherwise, from the time of delivery to you, as herein stated, until the said property is fully paid for, as provided herein. It is a further condition of this proposal that, when signed by you and approved by an executive officer or local manager of Fairbanks, Morse & Company, all the terms and conditions of same shall become binding upon both parties hereto and constitute a contract between us. This proposal is executed in duplicate, and it is expressly understood that it contains all of the agreements pertaining to said property herein specified, and that there is no verbal understanding whatever between us in reference thereto. All items of this proposal are contingent upon and subject to strikes, accidents or other causes beyond our control.

Signed by the plaintiff and accepted by defendant.

Defendant pleaded payment in part, and counterclaimed for $500 as damages for breach of the contract by the defendant. The actions were consolidated by consent and tried together. Plaintiff, having introduced the notes and contract, rested its case, whereupon the defendant offered the following testimony:

J. P. Turner testified: "That he is the defendant and did business as the Twin City Supply Company; that the engine in question was purchased to run a gristmill owned by the defendant, and it was to be installed by the plaintiff, who knew what it was to be used for. The defendant was engaged in the wholesale grocery business and was preparing to go into the mill business, grinding corn to sell at wholesale. The defendant owned the gristmill and the engine was purchased to furnish the motive power for the mill. The engine came and the same person who sold it came to install it. It was installed, but never worked satisfactorily. Sometimes it would lose an hour or so; didn't lose as much time at first as later. Within sixty days after the engine was installed the defendant made complaint by letter to the plaintiff, and in conse-

quence of that letter another man, supposed to be one of the plaintiff's experts, came to readjust and see what the trouble was. He stayed a day and the engine ran very well while he was there, and then it got back the same as it was. Defendant made another complaint, and in the course of something like three months the same man that came the
(318) second time came. He cleaned the points and put in new packing. This man tried to adjust it, took out the piston rod and piston. The second man didn't find any trouble with the points. A third man came after suit had been started and he found the trouble with the points, which were taken out, and he put in a new make. The original points were steel, and he put in German silver points, a better grade. It did not work after a third visit, and, finally, a fourth man came, a different man. This man worked for two days to find the trouble. He finally put in new points. The fourth man came twelve months after the engine was installed, and after that it ran satisfactorily. I did not make any payment at the time the contract was signed, but did make a payment six months after the engine was installed, to Mr. Fleming, the credit man, who came in person. Before the engine was put in good shape it ran about half the time. The notes sued on were signed by the defendant six months after the engine was installed. The engine was installed in November and the notes were executed in June following, and at the time of the visit of Mr. Fleming, and at the same time the $175 was paid. We were having some trouble with the engine at the time of Mr. Fleming's visit. The credit man didn't do anything but make promises to the defendant, provided he would pay and give the notes. At the time the engine had not been properly installed.

Q. Please state the terms and conditions upon which you paid the money to Mr. Fleming, and executed the notes, and state what agreement or promises, if any, he made to you as an inducement for you to pay the money and execute the notes so that he would fix the engine and make it run. (Objection by plaintiff. Sustained. Defendant excepts.)

The notes were witnessed by Mr. Fleming, who signed them the same time the defendant did. The defendant's check for $175, payable to Fairbanks, Morse & Company, was handed to Mr. Fleming.

Q. How much service did you get out of that engine from the time that it was first put in use until the visit of Mr. Fleming? (Objection by plaintiff. Objection sustained. Exception by defendant.)

Here the defendant offers, under the objection of the plaintiff, the court ruling the testimony out, the following testimony, to which the defendant excepts. The court, addressing the defendant, said: "Tell what he (referring to Fleming) said." A. "He came there and introduced himself to me and said that he represented the credit department of Fairbanks, Morse & Company, and he said that these payments were

all due and that he wanted a settlement for the engine. I told him of the trouble we were having and that they had sent two or three men before that time—three, I believe it was—to remedy the trouble, but that they never overcame the trouble. I told him that I refused to pay for the engine until the engine was placed in proper shape so that I could get service from it. He insisted upon a settlement. (319) Finally, he made me the proposition that if I would make the first payment of $175 and give my notes as they are for the balance, they had a man in Danville they would send immediately and let him stay until I accepted it in proper shape. I told him that I had had enough trouble and expense fooling with it; I was anxious to run the business, as I had customers waiting for the product, and, in order to get the engine in shape as quickly as possible, I did it. He said during the next week he would have the man. I made the payments on that promise, but it was sixty days before he came. He finally fixed it in November. The conversation with Mr. Fleming took place on 22 June. The last man fixed the points in November."

Mr. Hendren, speaking for the defendant: "You state that the date of this conversation was 22 June. What conversation are you talking about? The notes are dated 9 June." A. "The date the notes were made is the date of the conversation. I thought that was the date."

Upon the foregoing testimony offered by defendant, defendant proposes to prove damages by way of loss of profits and expenses incurred in help and interest on money invested in the plant for which the engine was to be used.

The court having ruled out this testimony, the defendant submitted to a verdict and judgment in deference to the court's opinion, and appealed to this Court, assigning error in the foregoing ruling.

P. W. Glidewell, Ira Humphreys for plaintiff.

Manly, Hendren & Womble and A. W. Dunn for defendant.

WALKER, J., after stating the case: As the presiding judge gave a peremptory instruction in favor of the plaintiff, holding that in no view of the case could the defendant sustain its counterclaim, and excluding the evidence from the consideration of the jury, we need only consider the validity of this ruling, and not discuss the question of damages. In the view we take of this case it does not involve the question of the authority of an agent to alter the terms of a written contract made by his principal, although it was made through his agency, whether forbidden by its express terms to do so or not (*Medicine Co. v. Mizzell*, 148 N. C., 387; *Piano Co. v. Strickland*, 163 N. C., 250, and cases therein cited), nor the other question, whether where the parties reduce

their contract to writing parol evidence can be received to contradict, add to, modify or explain it, in the absence of fraud, mistake or other equitable element. The general rules excluding such evidence, which are relied on principally by plaintiff, are fully conceded, but they do not apply here, as defendant admits that it is bound by the terms of the contract and can not recover for any loss it may have sustained
(320) which is provided against in the contract, or forbidden by its terms. This contract is somewhat like the one this Court considered in *Allen v. Tompkins,* 136 N. C., 208, where it was held that if the buyer of the machinery failed to make any request for new pieces of machinery to take the place of those which had proved to be defective, he could not recover damages, as the contract required that he do so, and that there should be no recovery if the seller complied with this stipulation of the contract and furnished the new pieces but that if application was made for the new pieces, and the seller failed to comply with the request, and to the extent he failed in that duty, he would be liable for the resultant damages. The Court, in that case, remarking that the ordinary rule of damages did not apply, "for the reason that in section 13 of the specification sheet, which forms a part of the contract between the parties, a specific and particular method of remedying original defects in the machinery is agreed upon, said: "The language of that section of the contract is as follows: 'We guarantee all machinery and equipment to be first-class in material and workmanship, and to work well for the purposes intended, if properly used. In case of original defects in any machine or part of machine, we agree to make good the defect by supplying a new machine or new part.' . . . The plaintiffs, before using the machinery and making payment, could have demanded a refitting of the machinery by the furnishing of new crusher rollers and a new separator to be in good order and capable of doing the work required of them, and, if those pieces had been furnished of such character, the defendant's liability would have been at an end. That was the contract between the parties. No breach of the contract, by which damage in money could be recovered, was in contemplation of the parties. Such an idea was excluded by the terms of the agreement. The plaintiff's remedy was for new pieces of machinery. If the defendant, upon demand for new pieces of machinery, refused to furnish them, then, of course, the ordinary rule would apply, and the plaintiff would have been entitled to collect such damages as reasonably flowed from a breach of the contract."

But *Kester v. Miller,* 119 N. C., 475, is more in point. There the defendants purchased an engine and a boiler to do the work which the sellers had guaranteed for it, and defendant was requested to keep it upon a promise of the sellers to put it in good condition, so as to bring it up

to the guaranty. This they failed to do satisfactorily. Plaintiffs sued upon the notes for the price, and defendants counterclaimed for a breach of the contract and asked for damages. This Court, holding that they were entitled to them, said: "As long as the plaintiffs insisted on the defendants keeping the engine, they, the plaintiffs, promising that they would make it satisfactory and remedy the defect, cannot be heard to say that they are not answerable to the defendants for loss they might subject them to by reason of their course. The contract not (321) having been performed by the plaintiffs, they, instead of forcing the defendants to make the option of receiving the engine and holding them liable for the difference between the contract price and the actual value or reject it, chose to induce the defendants to keep the engine and operate it while they were engaged in trying to put it in the condition guaranteed in the sale. If they saw fit to continue this attempt to remedy the defect it was at their risk and on their own responsibility, and that responsibility continued as long as they, without success, tried to put the engine in a satisfactory condition." That would seem to be exactly like this case in principle. The true meaning of this contract is that for any orignal defect in the engine the plaintiff should not be liable in damages, provided, on notice thereof to be given by defendant, it replaced any defective part with a new one of the same kind, but without any defect in it, and so that the engine would perform its normal functions and conform, thereby, to the terms of the warranty. There was a good reason for giving the plaintiffs this fair opportunity to make good their stipulation to furnish a good engine, as until it was shaken down and tested out any defect in it would not, perhaps, be discoverable, whereas, by using it a while, defendant would be able to detect any original and "inherent" imperfections in it; but the parties did not contemplate that the plaintiffs should not be liable in damages if any substituted piece itself proved to be defective, for the contract is that they will replace a bad piece with a good one, and any other meaning would make the contract absurd, and plaintiffs, as we understand, do not insist upon any such construction of it. Besides, it was not understood that the plaintiffs would be allowed an unreasonable or indefinite time to make good any defect in the engine, but only a reasonable time for the purpose of doing so. In the contract they had agreed and "guaranteed" that the engine should be of "good material and workmanship," and, if it was not, it would be made so upon application, and it was not intended by the other stipulation, as to how any breach in this respect might be atoned for, that the guaranty itself should be made nugatory. All instruments should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results, and the effect of the stipulation as to furnishing "new parts" should not be carried

beyond what is necessary to give the plaintiffs the full benefit thereof, and should not be in excess of the intention. "It is not the province of a court, however, to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by doing so the terms of a contract are ignored; for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must (322) be enforced if such is the clear meaning of the language used, and the intention of the parties using that language; but the words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other." 9 Cyc., 587.

Numerous cases are cited in the defendant's brief for the position, and they seem fully to sustain it, that where the seller has failed to comply with his part of the contract or warranty by not supplying the defective parts after receiving notice from the buyer, he thereby waives the stipulation as to substituting "good for bad parts," and the buyer is then remitted to his general right to recover the damages he has sustained by reason of the breach and to the extent that the buyer has breached the contract.

Osborne v. Marks, 33 Minn., 56, 59, is so much like this case in its facts that we desire to refer to it specially among the many cases upon this subject. It was an action upon a contract for the sale of a harvester and binder, with a provision as to curing defects. The Court said, referring to the obligations of the respective parties: "Though, upon a strict construction of the terms, notice is required only when (at any time during the first season) it should be first discovered that the machine failed to work, leaving it for appellant, on that notice, to ascertain wherein the defects lay and correct them, if they could be corrected, or be liable on its warranty if it failed so to do, a more liberal and, probably, the proper construction is that after a first attempt by appellant upon notice to correct defects, the respondent was to give the machine a reasonable trial; and, if upon such trial it failed, to give appellant reasonable notice thereof. But it would be going beyond not only the strict terms but the spirit of the warranty to hold that during the entire first season the respondent should be repeatedly giving notice, and repeatedly giving appellant opportunity to tinker at the machine and try to make it work, and that if respondent kept it over that season, even though appellant failed to permanently cure the defects, it should be conclusively taken to fill the warranty." See, also, *Seymour v. Phillips,* 61 Neb., 282; *Bank v. Durcher,* 128 Iowa, 413; *Osborne v. Henry,* 70

Mo. App., 19; *McCormick v. Finch,* 100 Mo. App., 641; *Frick v. Fry,* 75 Kan., 396; *Nichols v. Maxson,* 76 Kan., 607; *Massilon Co. v. Shirmer,* 122 Iowa, 699; *Altman v. Richardson,* 21 Ind. App., 211; *Acme Co. v. Gasparson,* 168 Mo. App., 558; *Osborne Co. v. Jordan,* 52 Neb., 465; *Port Huron Co. v. Clements,* 113 Wis., 249; *Kingman v. Myer Bros.,* 70 Ill. App., 476; *Westinghouse Co. v. Meixel,* 72 Neb., 623. Instructive and apposite cases, also, are *Detweiler v. Downes,* 119 Minn., 44; *Lorenz v. Hart,* 146 Wis., 261; *Randall v. Fay,* 158 Mich., (323) 670; *McCormick v. McNicholas,* 66 Minn., 384.

Detweiler v. Downes, supra, is an especially strong authority in favor of defendant's contentions in this case. It will be found that, in most of the above cited cases, the courts held that such a transaction as the one here between the agent of the seller, who is specially commissioned to adjust the matter of controversy between the parties, and the buyer, by which, upon representations and promises that the machine will be put in good or satisfactory working order, the agent obtains the notes for the price, will amount to a waiver of the stipulation as to supplying new parts for those proved to be defective or for a return of the machine, and enable the buyer to recover his proper damages to the extent he has been injured and within the well-settled rules relating to the assessment of damages in such cases. It is contended also that the plaintiff has accepted the cash payment and the notes, and retained them, and actually sues upon the latter, after having knowledge of what transpired between its agent and defendant, which would amount to a ratification, if found to be true. *Osborne v. Jordan,* 52 Neb., 645; *Randall v. Fay, supra; McCormick v. McNicholas, supra.* We could not hold that, where an agent, acting for his principal within the scope of his authority, makes a false promise of reparation for the purpose of inducing the other party to give his notes for an engine bought of the principal, and thereby obtains the notes, the seller is thereby precluded or estopped from claiming damages for a breach of the contract. In this case it appears, and we must assume the evidence to be reliable and true, under the peremptory charge of the judge, that the plaintiff failed to act with reasonable promptness and diligence in performing its part of the contract, by supplying sound parts for the defective ones, and putting the engine in good working order according to its warranty that it should be of good material and workmanship, as there were several unexplained delays and the engine was never in good running condition for a whole year after it was delivered. It would appear strange to us if the law permitted such an injustice, and we do not think that it does give any approval to it.

Our case is not like *Frick v. Boles,* 168 N. C., 654, for here the defendant had complied with his part of the contract by giving proper

notice of the defects in the engine and requesting that they be remedied, according to its terms. He has failed in nothing, so far as now appears, except in the payment of the notes, and, as against recovery upon them, he is asserting a counterclaim for the breach of the stipulations by the plaintiff. Contracts like this one are somewhat one-sided and should not be too strictly enforced in favor of the seller, but with some regard to the just rights of the buyer.

There was error in the decision of the court for the reasons given.

New trial.

Cited: Fay v. Crowell, 184 N. C., 417 (3f); *Ferry Co. v. Fairbanks, Morse & Co.,* 201 N. C. 488, 489 (3f); *Mfg. Co. v. Lefkowitz,* 204 N. C. 454 (3f).

(324)

LOWER CREEK DRAINAGE COMMISSIONERS v. F. B. MITCHELL AND WIFE.

(Filed 8 December, 1915.)

1. Evidence—Statutory Powers—Prima Facie Case—Drainage Districts.

It is within the power of the Legislature to change the existing rules of evidence so as to give to proof of certain facts the effect of establishing *prima facie* a fact in issue, if there is a reasonable relation between the two; and the enactment of sec. 5, ch. 287, Public-Local Laws 1915, amendatory of ch. 46, Public Laws 1911, known as the Drainage Act, giving the itemized statement, verified by the tax collector of the district, the effect of *prima facie* evidence of the existence and legality of the taxes assessed as well as of the amount, is a valid exercise by the Legislature of its authority.

2. Same—Constitutional Law—Federal Constitution.

Sec. 5, ch. 287, Public-Local Laws 1915, known as the Drainage Act, making the itemized statement, verified by the collector of the district, *prima facie* evidence of the existence and legality of the tax assessed, as well as of the amounts, etc., affords the taxpayer opportunity to rebut this evidence with his own evidence, before being called upon to pay, and does not deprive him of his property without due process of law contrary to the inhibition of the Fourteenth Amendment to the Federal Constitution.

APPEAL by defendant from *Adams, J.,* at May Term, 1915, of CALDWELL.

Action to recover assessments levied against the defendants in Lower Creek Drainage District in Burke and Caldwell counties.

The district was organized under ch. 96, Public Laws 1909, and it is provided therein that the collector shall collect the assessments by civil action, with the right of appeal to the Superior Court, if the action is instituted before a justice of the peace. The original act was amended by ch. 46, Public-Local Laws 1911, which granted additional powers, including the right to levy larger assessments, and, again by ch. 287, Public-Local Laws 1915, the part of the last act which is material to this appeal being as follows:

"Sec. 5. That in all actions now pending or hereafter to be instituted for the collection of taxes under the provisions of said chapter ninety-six, Public Laws of one thousand nine hundred and nine, as amended, the introduction in evidence of a sworn itemized statement of the amount of taxes due to said district, verified by the oath of the collector for the time being, shall be *prima facie* evidence of the existence and legality of the taxes assessed against the party by such statement charged, as well as the amount of taxes due by such party."

On the trial the plaintiff introduced the itemized statement of the amount of the assessment verified by the oath of the collector, and the defendant excepted. The defendant offered no evidence. There was a verdict and judgment for the plaintiff, and the defendant (325) appealed, assigning the following error:

1st Assignment. In that the holding of the act of 26 February, 1915, constitutional violates the letter and spirit of the 7th section of the Bill of Rights of the Constitution of North Carolina.

2nd Assignment. It violates the 8th section of the Bill of Rights.

3rd Assignment. It violates the 17th section of the Bill of Rights.

4th Assignment. It violates the 19th section of the Bill of Rights.

5th Assignment. It violates the 35th section of the Bill of Rights.

6th Assignment. It violates the 14th Amendment of the Constitution of the United States.

Squires & Whisnant and M. W. Harshaw for plaintiff.

M. V. Wolfe, W. C. Newland and Edmund Jones for defendant.

ALLEN, J. Statutes similar to the one before us, providing for the drainage of lowlands, have been sustained as a valid exercise of legislative power in several recent decisions. *Adams v. Joyner,* 147 N. C., 83; *Sanderlin v. Luken,* 152 N. C., 738, and others. It is also settled in this State and elsewhere that it is permissible for the General Assembly to give to proof of certain facts the effect of establishing *prima facie* a fact in issue, provided there is a reasonable relation between the two. The same rule prevails as to civil and criminal causes, and was very fully considered in *S. v. Barrett,* 138 N. C., 630.

The Court, in that case, quotes from McLain's Criminal Law as follows: "Laws which prescribe the evidential force of certain facts by enacting that upon proof of such facts a given presumption shall arise, or which determine that facts shall constitute a *prima facie* case against the accused, casting the burden of proof upon him of disproving or rebutting the presumption, are not generally regarded as unconstitutional, even though they may destroy the presumption of innocence. An accused person has no vested right in this or any other presumption or law of evidence or procedure that the lawmaking power cannot, within constitutional limits, deprive him of. The existing rules of evidence may be changed at any time by legislative enactment"; and adds: "The Legislature of this, and, we presume, every other State, has frequently changed the rules of evidence and declared that certain facts or conditions, when shown, shall constitute *prima facie* evidence of guilt. The power to do so has always been sustained."

The rule has been applied in this State as to crimes in the statute against carrying concealed weapons (Rev., sec. 3708), which makes the possession of a deadly weapon named in the statute, about one's person, *prima facie* evidence of concealment; in the statute making the possession of more than one gallon of intoxicating liquors *prima facie* (326) evidence of having the liquor for sale (*S. v. Wilkerson* 164 N. C., 431), and in other statutes, and in civil matters, notably as applied to this case, in the statute (Rev., sec. 1625), making a verified, itemized statement of an account *prima facie* evidence of its correctness, which has been sustained in several decisions. *Knight v. Taylor,* 131 N. C., 84; *Claus v. Lee,* 140 N. C., 552.

It will be observed that the statute only makes the itemized statement, verified by the oath of the collector, *prima facie* evidence of the existence and legality of the taxes as well as of the amount, and this permits the introduction of evidence to prove the contrary, and thus gives to the defendant the opportunity of being heard before he is called upon to pay, and, therefore, he is not deprived of his property without due process of law. *Kinston v. Loftin,* 149 N. C., 257; *Kinston v. Wooten,* 150 N. C., 298; *Tarboro v. Staton,* 156 N. C., 508.

In the first of these cases, which is approved in the others, the action was to collect an assessment for street improvements under a statute requiring a suit to be instituted to collect the assessment, and the defendant objected that he had not had notice prior to the levying of the assessment; but it was held that as the assessment had to be enforced in the courts, and as he could be heard when the action was instituted, he was not deprived of his property contrary to the law of the land, the Court saying: "The order for the improvement was formally made, the work has been well done at a reasonable cost, and the amount assessed

well within the limit allowed and established by the law; and, in the present suit, instituted as provided by the statute, the defendants have been afforded opportunity to assert and establish every defense available to them, either by reason of irregularity or on the merits. In *Davidson v. New Orleans,* 96 U. S., 104, *Miller, J.,* delivering the opinion of the Court, said: 'That whenever, by the laws of a State, or by State authority, a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' The objection of defendant, therefore, urged on the ground that no proper notice was provided for, cannot be sustained."

We find.

No error.

Cited: Lumber Co. v. Drainage Comrs., 174 N. C. 649 (1p, 2p); *S. v. Bean,* 175 N. C. 752 (1j, 2j); *O'Neal v. Mann,* 193 N. C. 157 (1b, 2b).

(327)

EMMA F. SCOTT AND HUSBAND, A. J. SCOTT, v. THE BOARD OF COMMISSIONERS OF CABARRUS COUNTY.

(Filed 8 December, 1915.)

Roads and Highways—Relocation—Injunction—Damages—Appeal—Constitutional Law.

By provision of ch. 201, Laws 1907, relating to the public roads of Cabarrus County, the superintendent is empowered to locate, relocate, widen or otherwise change any public road or part thereof, after filing a petition and map with the board of county commissioners, containing estimated cost and other data, and the superintendent is also required to notify the landowners, who are allowed the right of appeal from the order of the commissioners, providing for a trial *de novo* in the Superior Court, and for the award of compensation, but that the appeal shall not delay the construction of the road. In this suit to restrain the construction of a proposed relocation, it appeared by affidavit that it would cause permanent and serious damage to the plaintiff's land, and, in defendant's behalf, that the old road could not properly be kept up on account of springs, a watercourse and the low lay of the land, and that the proposed relocation had been worked on with expense, and that the public

convenience of travel required it: *Held*, an order restraining the relocation of the road to the hearing was properly dissolved.

APPEAL by plaintiff from *Shaw, J.*, at April Term, 1915, of CABARRUS.

Proceeding instituted before the board of commissioners of Cabarrus County in reference to a change of location in a public road, known as the Salisbury road, heard on appeal from the order of commissioners therein to the Superior Court, and on motion to dissolve a preliminary restraining order.

There was judgment dissolving the restraining order, and plaintiffs, having duly excepted, appealed to this Court.

L. T. Hartsell and Morrison Caldwell for plaintiff.

H. S. Williams and J. L. Crowell for defendant.

HOKE, J. The public road law of Cabarrus County, Laws 1907, ch. 201, secs. 14 and 15, contains provision, among other things, that the superintendent of roads shall have power to locate, relocate, widen or otherwise change any public road, or parts of same, in the county, or lay out and establish a new public road, whenever such location, change, etc., shall be considered necessary and advantageous to public travel, etc., but before doing so he is required to file a petition before the board of commissioners stating the proposed changes, with a map, the estimated costs, number of culverts, bridges, etc. The superintendent is also required to notify the interested landowners, etc. If the proposed change is ordered, the same shall amount to a condemnation, etc., and the superintendent shall proceed to construct the road pursuant to the plan as approved and ordered. In reference to the right of appeal, sec. 15
(328) makes provision: "That any landowner interested may appeal to the Superior Court for a trial *de novo*, on giving a bond for costs," but "the taking of said appeal shall not delay the changing, locating or relocating of any public road or the discontinuing or abandoning of any public road, according to the terms of the order made therein by the said board of commissioners, unless the same be reversed by the trial in the Superior Court." The statute also makes ample provision for compensation to any landowner injured by the proposed changes. In the present case, the commissioners having made an order for the proposed location, plaintiffs appealed and filed in the Superior Court their verified complaint, used on the hearing as their affidavit and evidence, and in which they specify the reasons why the restraining order should be continued to the hearing, as follows:

"(a) Because the line or route recommended by J. M. Burrage, superintendent of roads, at March meeting of the board of commissioners, is such a change as is not "necessary and advantageous to public travel"

as provided by chapter 201, Public Laws of North Carolina, 1907, the same being about 15 feet shorter than the present road, and said road will be much more expensive to the county to build and will greatly damage said landowners, Emma F. Scott and husband, A. J. Scott.

"(b) Because the plan and purpose of said superintendent of roads to erect a fill 40 feet wide and 7 to 10 feet high across the bottom lands of Emma F. Scott and husband, A. J. Scott, and to leave an opening of about 110 feet, will cause the water of said creek to be dammed and flooded over the 25 acres of their land upon which they have been assessed $20 per acre by drainage district, to their great injury and damage.

"(c) Because the said change of road and said embankment will cut off from their pasture a branch of water that has been used for more than twenty years to water their cattle, and this damage and deprivation of the use of their branch water could be entirely avoided if the road be not changed.

"(d) Because said plan and change of the road, as laid out, calls for a cut 8 feet deep within less than 50 feet of the plaintiff's residence and will cause the destruction of a number of fine elm trees in their yard.

"(e) Because said road will take about 4 acres of their best land, which has been improved at great expense, and will cut off a narrow strip of land between said road and the dower tract and present road. Said strip will be so narrow as to be almost worthless to them."

The commissioners, in their verified answer, also used as an affidavit, give a detailed statement of the proceedings, and, among other things, make averment as follows:

"That the public road in controversy in this proceeding is one of the public roads leading out from the city of Concord, the county-seat of Cabarrus County, and is a continuation of East Depot Street (329) from the corporate limits, and is known as the new Salisbury road. That said public road runs through one of the best and most thickly settled sections of Cabarrus County, and the citizens who live in that part of the county have no other public road leading from said sections except the road in controversy, the said road having been a public road, much used since the town of Concord was established. On account of the many hills, springs and boggy places in the old road, it becomes very bad and almost impassable in bad weather, and the rural mail carriers and traffic and the citizens and general public, who are forced to use this road in coming to and returning from market, and for other purposes, have for a long time complained of the bad condition of this road and have repeatedly demanded of the county to change and improve it; and in order to get the best results for the public money necessary to build a permanent road, and one which will be the greatest good to the greatest number, with the minimum inconvenience and least damage to the lands of

those over which the changes in the proposed road are to run, the authorities of the county, after mature consideration, adopted the line surveyed over the lands claimed by plaintiffs, and defendants now believe the changes proposed and adopted by them are the ones that should be carried to completion as speedily as possible for the convenience of the general public.

"That the portion of said road which it is proposed to change, and which plaintiffs oppose and seek to enjoin, is partly across a low, boggy bottom, and a branch flows along the old road a greater part of the distance across said bottom, which is overflowed by Big Cold Water Creek whenever it overflows its banks, and the other part is a long, steep hill with a number of wet and springy places in same, thus constituting one of the worst sections of public road in Cabarrus County, and on account of the topography and physical condition of the land in which this section of the road lies, makes the proposed change absolutely necessary and very advantageous to public travel; it being impossible to make a good road across the said low or bottom land without making a fill several feet high, and it is impracticable to build said fill in the old road because of the branch which runs along for some nine hundred feet across said bottom, and the wet, springy places at other points along said old road and the dirt necessary to make a proper fill across said bottom cannot be gotten by following the said road up said hill without hauling said dirt for a long distance and necessitating making a cut several feet deeper than the one about eighteen inches deep contemplated by defendants in front of the house where plaintiffs reside; and, besides, the proposed change is shorter and more direct, affording a better grade and drain to the roadbed at much less cost and expense to the county than to make a road where the old road runs; and, when completed,
(330) will be well drained and much more desirable and advantageous to the public travel, and a more permanent roadbed, and less expensive to keep in good condition than to build the road along the old roadbed or in another place."

The affidavit of the commissioners contains further and elaborate statement of the conditions making it impossible to use or improve the old road to advantage, and further, that large sums of money have been already spent in preparing the present road for use and necessary bridges built at great expense, and that if this road and its use should now be stopped by restraint, large numbers of citizens would be without the use of a public way on which to travel and would cause irreparable and unnecessary damage to the county and the public.

The affidavit then closes with allegations as follows:

"The work has been about completed on the west side of the creek, between said creek and Concord, and if the defendants should be re-

strained from continuing said work on east said of said creek the result would be to force the authorities of the county to move the convict force and camp to some other section of the county, and the abandonment of the work of this road, and insure a large and unnecessary expense to the county and work a very great hardship and inconvenience to the citizens in this whole section of the county and upon the public travel; and instead of said proposed change of road working any hardships or inconvenience upon plaintiffs or injuring or damaging them, it would be a great convenience and benefit to them and enhance the value of the property they claim more than any other property along said improved road; but even if said change should damage the property of plaintiffs, they have their remedy in an action for damages. And a public improvement so necessary and advantageous to such a large number of citizens and taxpayers of the county and the general public, which aids the development of the resources of the county, should not be interfered with and stopped because of the objection of the plaintiffs."

Upon these, the affidavits and evidence of the respective parties, we think the case presented in the record, as it now appears, is one where, under many decisions of our Court, the private right must yield, for the present, at least, to the public good, and that the restraining order was properly dissolved. *Jones v. Lassiter,* 169 N. C., 750; *Little v. Lenoir,* 151 N. C., 415; *Griffin v. R. R.,* 150 N. C., 312; *Durham v. Cotton Mills,* 141 N. C., 615; *Vickers v. Durham,* 132 N. C., 880; *Dorsey v. Allen,* 85 N. C., 358.

Not only is this true on general equitable principles, as illustrated and approved in these decisions, but it undoubtedly should prevail in this case; the statute itself containing express provision that, when the proposed plan or scheme is approved by the board of commissioners, the work shall not be delayed unless the same be reversed by the trial in the Superior Court—a provision that is clearly not unreason- (331) able, on perusal of the present record.

As heretofore stated, the statute makes express and adequate provision for an award of damages if plaintiffs have been wrongfully injured in the proposed location of the road.

There is no error, and the order of his Honor is

Affirmed.

C. M. CHAMPION v. JOE F. DANIEL AND C. L. MILLER, ADMINISTRATORS OF W. M. WINTHROW, DECEASED.

(Filed 8 December, 1915.)

Instructions—Conflicting Charge—Corrections—Appeal and Error.

Where damages are sought in an action for burning a barn, the plaintiff is only required to establish his case by the greater weight of the evidence; and where in his charge the court has instructed the jury variously as to the degree of proof required, that the plaintiff must satisfy them that the defendant's intestate did burn the property; that the evidence must be clear, convincing and satisfactory; that it must satisfy them by its greater weight, it constitutes reversible error; and this error is not sufficiently corrected when, afterwards, at the request of the jury for enlightenment, he correctly charges them upon the question of the burden of proof without calling their attention to the former charge and specifying the error therein, which is required to be corrected.

APPEAL by plaintiff from *Harding, J.*, at August Term, 1915, of RUTHERFORD.

Civil action. This action was brought to recover damages for the willful and wrongful burning of the plaintiff's ginhouse, flour mill, dwelling-house and stock of merchandise. The jury returned a verdict in favor of the defendants, and from the judgment thereon plaintiff appealed.

Quinn, Hamrick & Harris, McBrayer & McBrayer, Cansler & Cansler for plaintiff.

W. C. McRorie, Ryburn & Hoey and M. L. Edwards for defendants.

WALKER, J. We need consider only one exception of the plaintiff. The judge, in varying forms, charged the jury that, before they could return a verdict for the plaintiff, the evidence being largely, though not altogether, circumstantial, he must, by evidence, fully satisfy them that the intestate of the defendants did burn the property as alleged. Sometimes he charged that the evidence must be clear, convincing and satisfactory, and again that it must satisfy them by its greater weight that the unlawful act was committed. When the learned judge charged
(332) that the law required of the plaintiff that he should establish his case by a greater quantum of evidence than a mere preponderance, he also told the jury that if he had failed to do so they should answer the first issue, as to the wrongful burning of the property, "No." After the jury had been absent from the courtroom for some time they returned and said to the court that it seemed that they had failed to understand as to the weight of the evidence, meaning the quantum thereof, whereupon

the judge did charge them that they must be satisfied of the unlawful burning by the greater weight of the evidence. While this was done, we do not think it was a sufficient compliance with the rule we have heretofore laid down to cure the former error of the judge.

In civil cases the general rule is that a preponderance of the evidence is sufficient, if favorable to the plaintiff, or to him who has the burden of proving the issue, to warrant a verdict in his favor, but there is an exception where the relief demanded is the correction or reformation of a written instrument, when the law requires that the evidence should be clear, strong and convincing. *Ely v. Early,* 94 N. C., 1; *Harding v. Long,* 103 N. C., 1; *Cobb v. Edwards,* 117 N. C., 253; *Avery v. Stewart,* 136 N. C., 426; *Lehew v. Hewett,* 138 N. C., 6; *Lamb v. Perry,* 169 N. C., 436; *Ray v. Patterson, ante,* 226. In *Avery v. Stewart, supra,* and *Lamb v. Perry supra,* we undertook to state and explain the principle upon which this rule is based, and to show why the law made this difference in the quantum of proof dependent upon the nature of the cause of action and the relief demanded. In criminal cases the jury must be convinced beyond a reasonable doubt of the prisoner's guilt before they can convict, because the law presumes strongly in favor of his innocence, and requires convincing evidence to overcome it. Where the court is asked to correct a deed, for instance, the party asking for the relief must make out his case by evidence which is clear, strong, and convincing, because there is cogent presumption that, when parties have solemnly reduced their contract or agreement to writing, the instrument correctly expresses the agreement, and for that reason a greater weight of evidence is required to show the contrary. In ordinary civil cases there is not so great a presumption in favor of the defendant, and the quantum of proof required is consequently less. In this case the judge, several times, laid down the rule that applies to criminal cases, as he told the jury that they must be fully satisfied, and also stated the rule applicable to a case where it is sought to correct a written instrument. It is very true that when the jury came back for further instructions he charged them correctly as to the weight of the evidence (*Chaffin v. Mfg. Co.,* 135 N. C., 99, 100), but when two contradictory instructions are given, we have often said that the jury, being unlearned in the law, are not supposed to know which of them is the right one, and therefore they are necessarily confused as to what the law is, and, being so, it necessarily follows that they cannot correctly apply it. *Williams* (333) *v. Haid,* 118 N. C., 481; *Tillett v. R. R.,* 115 N. C., 662; *Edwards v. R. R.,* 132 N. C., 99; *McWhirter v. McWhirter,* 155 N. C., 145. The last authority cited bears directly upon this question presented here, as there the conflicting instructions related to the quantum of proof. It is just the converse of this case.

In *Jones v. Ins. Co.*, 151 N. C., 54, the judge had given contradictory instructions. We said that if the last instruction had been correct it would not have cured the error in a former one, as the attention of the jury was not called to the error with a view of correcting it, and of removing the wrong impression made upon the minds of the jurors by the erroneous instruction. And the same idea is advanced by *Justice Brown* in *Wilson v. R. R.*, 142 N. C., 333, at pp. 340, 341: "As we have held, his Honor instructed the jury in the previous part of his charge practically that punitive damages might be allowed. If he intended this as a correction of the former part of his charge it was his duty to have called the attention of the jury to it as a correction. It would seem from this colloquy between judge and counsel that both thought that the court had not already instructed practically that the jury could award exemplary or punitive damages. The court ought to have defined what is meant by punitive damages, for, as it is a technical legal term, the jury might not have considered that his Honor had already charged in effect that they could award them. So we think that, notwithstanding what the court stated at the conclusion of the charge, the jury might have felt at liberty to go beyond compensatory damages under the authority of what had been previously said. They had a right to suppose that if his Honor intended to correct his charge he would have called their attention to it as a correction. The jury were, therefore, left at sea, between contradictory instructions upon the issue of damages, which, under numerous decisions of this Court, entitles the defendants to a partial new trial. In *Edwards v. R. R.*, 132 N. C., 101, it is said: 'It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly.'"

This Court said in *Hoaglin v. Tel. Co.*, 161 N. C., 390, at 398, 399: "The error of the court in thus instructing the jury requires us to order a new trial, as we are unable to determine whether the answer to the first issue was given under the charge as to the duty of defendant to repair its wire with reasonable care and diligence, or under the erroneous instruction. If we could separate the two because we knew with certainty that the jury were not influenced by the error, we would do so, but it is impossible, as the correct and incorrect instructions have all together passed into the verdict, which is indivisible. In such a
(334) case a new trial is the only remedy for the error. *Rowe v. Lumber Co.*, 133 N. C., 433, and cases cited; *Dunn v. Currie*, 141 N. C., 126. It is analogous to the principle decided in *Williams v. Haid*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 662; *Edwards v. R. R.*, 132 N. C., 99; *S. v. Barrett*, 132 N. C., 1005, and more recently, in *Patterson*

v. Nichols, 157 N. C., 413. *Justice Allen* said, in *Patterson v. Nichols,* 157 N. C., at p. 413: "When the charge on the first issue is considered as a whole there are inconsistent directions to the jury, which must have left them in doubt as to a correct finding upon the issue.

These references to our cases are sufficient to show how careful, if not exacting, we have been to require that if a judge has given conflicting instructions and wishes to correct the erroneous one, he should refer to the error and withdraw it from his charge, or so explain the matter to the jury that they may certainly understand that he means to correct the error and to give them the right instructions as to the law. This was not done here. The court merely repeated what had been said before in the general charge, without referring to the two or more erroneous instructions as to the quantum of proof, and we cannot be sure that the jury understood what the correct rule was. It is very evident from what they said, when they returned to the courtroom for further instructions, that they were confused, and, in order to have fully removed from their minds any wrong impression as to the law, produced by previous instructions, the erroneous ones should have been clearly eliminated and only the correct ones left to the jury. We do not think that the mere use of the word "satisfied," in connection with those other words, "by the greater weight of evidence," vitiated the instructions. We discussed this fully in *Chaffin v. Mfg. Co.,* 135 N. C., at pp. 99 and 100: "It will not do (as we there said), in passing upon the correctness of a charge, to consider it in detached portions, but we must look at the context and examine what follows in connection with that which precedes. In other words, the charge must be considered as a whole. *Elliott v. Jefferson,* 133 N. C., 211; *Everett v. Spencer,* 122 N. C., 1010. The same rule applies when deciding upon the admissibility of testimony. *S. v. Ledford,* 133 N. C., 714. When the part of the charge of the court excepted to is considered and tested by this reasonable rule of the law we think it sufficiently and, indeed, clearly, appears that the jury were instructed, at least substantially, that the plaintiffs were required to make out their case by a preponderance of the testimony and that the jury should apply the rule to the facts and circumstances of the case in order to determine whether plaintiff had met the requirement. The use of the word 'satisfied' did not intensify the proof required to entitle the plaintiffs to their verdict. The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied or, in other words, be able to reach a decision or conclusion from the evidence and in (335) favor of the plaintiff which will be satisfactory to themselves. In order to produce this result, or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiffs' proof need not be more

than a bare preponderance, but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence." But, as we have shown, this instruction, however correct in itself it may be, did not cure the error which was left in the charge.

We are satisfied, from a careful perusal of the entire record, the evidence and the charge, that grave injustice may be done unless we set aside the verdict and direct that the case be submitted to another jury.

New trial.

Cited: Lea v. Utilities Co. 176 N. C. 513 (f); *Young v. Comrs.*, 190 N. C. 846 (f); *May v. Grove*, 195 N. C. 237 (f); *Allen v. Cotton Mill*, 198 N. C. 41 (f); *Templeton v. Kelly*, 217 N. C. 166 (f); *Bailey v. Hayman*, 222 N. C. 61 (b).

J. S. MOON ET AL., TRADING AS MOON-TAYLOR COMPANY, v. SAMUEL W. SIMPSON.

(Filed 8 December, 1915.)

Bills and Notes—Indorsements—Holder in Due Course—Prima Facie Case—Purchaser for Value—Burden of Proof—Appeal and Error.

Where there is neither allegation nor proof that the title to a negotiable instrument is defective (Revisal, secs. 2208, 2204), the holder thereof by indorsement is only required to prove the indorsement for him to be deemed *prima facie* a holder in due course (Revisal, sec. 2208); that is, he is *prima facie* a purchaser in good faith for value, before maturity, and without notice of any infirmity in the instrument, or of any defect in the title of the person negotiating it; and where such holder has shown such indorsement of the instrument sued on it is reversible error for the trial judge to charge the jury that the burden of proof is on him to prove by his evidence, other than by the presumption, that he had paid value for the instrument.

APPEAL by intervener from *Lyon, J.*, at March Term, 1915, of GUILFORD.

This action was brought to recover damages sustained upon the sale of a carload of wheat by the defendant, Simpson, to the plaintiffs. On the day the action was commenced the plaintiffs procured a warrant of attachment and had the same levied on the sum of one thousand and eighty-six and twenty-seven hundredths dollars ($1,086.27), paid by the plaintiffs to the American Exchange National Bank, to cover a certain draft to which was attached a bill of lading for the purchase price of another carload of wheat. Thereafter, the Fauquier National Bank of

Warrenton, Va., filed an affidavit claiming the one thousand and eighty-six and twenty-seven hundredths dollars $(1,086.27) as its property, and an order was made allowing it to intervene and set up its claim to the money.

The draft was indorsed, "Pay to the order of Fauquier Na- (336) tional Bank, Warrenton, Va. (Signed) Samuel W. Simpson," and the bill of lading was attached thereto.

The jury returned the following verdict:

Is the Fauquier National Bank of Warrenton, Va., intervener, the owner of the money attached in this proceeding? Answer: No.

Judgment was entered upon the verdict in favor of the plaintiffs and the intervener appealed.

Brooks, Sapp & Williams for plaintiffs.

King & Kimball for intervener.

ALLEN, J. The burden is upon the holder of a negotiable instrument payable to order, which has been indorsed, to prove the indorsement (*Tyson v. Joyner,* 139 N. C., 69), and when he does so he is deemed *prima facie* to be a holder in due course (Rev., sec. 2208), that is, he is deemed *prima facie* to be a purchaser in good faith for value, before maturity, and without notice of any infirmity in the instrument or of any defect in the title of the person negotiating it. Rev., sec. 2201. He is not required to prove that he paid value for the instrument, as the statute furnishes this evidence for him. The following authorities and others sustain this position: *Mfg. Co. v. Tierney,* 133 N. C., 630; *Evans v. Freeman,* 142 N. C., 61; *Trust Co. v. Bank,* 167 N. C., 261; *Bank v. Roberts,* 168 N. C., 475.

The Court said, in the *Tierney case,* of a bank holding a draft with bill of lading attached: "When, however, it introduced the draft with the bill of lading attached, and showed by the evidence of the cashier that it was in the possession of the bank, with an unrestricted indorsement, the presumption arose that it was a purchaser for value without notice of any defenses or equities of the drawee or consignee," and, in the *Trust Co. case,* "Our negotiable instrument law is simply the codification of the common law, and under both the statute and the common law the possession of a negotiable instrument by the indorsee, or by a transferee where indorsement is not necessary, imports *prima facie* that he is the lawful owner and that he acquired it before maturity, for value, in the usual course of business and without notice of any circumstances impeaching its validity. Nothing else appearing, this entitles the holder of a negotiable instrument to maintain an action upon it. By presenting the paper, in case duly indorsed, the plaintiff made out a *prima facie*

case, that is, a case sufficient to justify a verdict for him on the first issue." This *prima facie* case may be rebutted.

The rule is different where it is shown that the title of the person who *negotiated the instrument* is defective (Rev., sec. 2208), and his title is defective if "he obtained the instrument or any signature thereto, (337) by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiated it in breach of faith or under such circumstances as amount to fraud." Rev., sec. 2204.

In such case, when it is shown that the title of the person who negotiated the instrument is defective, or there is evidence of the fact, "It is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he acquired the title (1) before maturity; (2) in good faith for value; (3) without notice of any infirmity or defect in the title of the person negotiating it." *Mfg. Co. v. Summers,* 143 N. C., 108; *Smathers v. Hotel Co.,* 168 N. C., 69; *Bank v. Fountain,* 148 N. C., 590; *Bank v. Bronson,* 165 N. C., 344; *Bank v. Drug Co.,* 166 N. C., 100.

The intervener bank has not had the benefit of these principles upon the trial, as there is no evidence that the title of the person who negotiated the instrument was defective, and it has produced a negotiable instrument duly indorsed, and has proved the indorsement, and his Honor placed upon the intervener the burden of going further, and of proving to the satisfaction of the jury by evidence other than the production of the draft duly indorsed that it paid value for the draft and bill of lading, and he in no part of his charge told the jury that upon the indorsement being proved the intervener was deemed to be a purchaser for value, nothing else appearing.

There must be a

New trial.

Cited: Worth Co. v. Feed Co., 172 N. C. 342 (f); *Moon v. Simpson,* 172 N. C. 577 *S.c.; Sternberg v. Crohon,* 172 N. C. 737 (g); *Woody v. Spruce Co.,* 175 N. C. 547 (p); *Bank v. Sherron,* 186 N. C. 299 (b); *Bank v. Wester,* 188 N. C. 375 (b); *Whitman v. York,* 192 N. C. 90, 93 (b); *Bank v. Rochamora,* 193 N. C. 5 (l); *Clark v. Laurel Park Estates,* 196 N. C. 637 (b).

HENRY BEER ET AL. v. WHITEVILLE LUMBER COMPANY.

(Filed 24 November, 1915.)

1. State Lands—Entries—Swamps—Separate Tracts—Interpretation of Statutes.

Where an action of trespass upon lands, involving title, is made to depend upon the validity of entry and grant of swamp lands by the State to the defendant under the provisions of Revisal, sec. 1693, that the same is not subject to entry if in one marsh or swamp exceeding 2,000 acres, with certain exceptions not material to the case, and of sec. 1694, that marsh or swamp lands, if in a tract not exceeding 2,000 acres, is subject to entry, making void, by sec. 1699, all entries not authorized by ch. 37; and the fact is established by agreement of the parties that the defendant's entry was on Big Cypress, which was within the number of acres subject to entry unless included within Seven Creeks Swamp, and that the former entered into the latter at an angle of 90 degrees, running up some four miles, beginning in a narrow stream, two or three hundred yards wide where it empties, but narrower there than it is several hundred yards further up: *Held*, as a matter of law that Big Cypress is a separate tract of marsh or swamp land from Seven Creeks, and the exceptions of the statute not applying, the defendant's entry is a valid one, though it appears that sometimes during freshets and high water these swamps are all covered with one sheet of water.

2. State Lands—Swamps—Definition—Interpretation of Statutes.

Swamp lands, within the meaning of our statutes, are those too wet for cultivation except by drainage. Revisal, secs. 1693, 1694, 1699.

APPEAL by plaintiff from *Whedbee, J.*, at February Term, 1915, (338) of COLUMBUS.

Civil action.

John D. Bellamy & Son for plaintiff.

Schulken, Toon & Schulken and J. O. Carr for defendant.

WALKER, J. The question presented is whether Big Cypress Swamp is a separate and distinct swamp, or is to be considered as a part of Seven Creeks, within the intent and meaning of our entry laws, the *locus in quo* being a part of what is known as Big Cypress. Plaintiff claimed the land under a deed from the State Board of Education to Hackley V. Hume, dated 16 November, 1891, and a deed from the latter to him dated 23 May, 1892, and defendant, under a grant from the State to S. C. Stevens, dated 4 September, 1892, for 55 acres, part of Big Cypress, and a deed from Stevens to it for the timber on said 55 acres, the trespass consisting in the cutting of said timber by the defendant.

After all the evidence was closed defendant renewed its motion for a nonsuit, whereupon the following entry was made:

"It was agreed by counsel that there is no question for the jury to determine except the one of damage, and counsel for both plaintiff and defendant further agreed that the actual damage to the land in dispute by reason of severing of the timber therefrom by the defendant is the sum of $150. Counsel for both plaintiff and defendant agree that there is no substantial dispute in respect to the facts about whether or not the lands in controversy were part of a swamp containing more than 2,000 acres; the testimony of plaintiff and defendant both, in the main, being substantially the same, to the effect that Big Cypress makes into Seven Creeks at an angle of about ninety degrees and runs some four miles up, beginning in a very narrow and small stream and coming down until it is two or three hundred yards wide at the point where it empties into Seven Creeks, being narrower at the point where it empties into Seven Creeks than it is several hundred yards further up. The Court being of opinion that under this statement of facts and the evidence of both parties the swamp known as Big Cypress is a separate and independent swamp, as a matter of law, from that of Seven Creeks, the motion of nonsuit is sustained. It is agreed that in any aspect of this case, whatever any future determination of the same may be, that the value of the timber cut from this land shall not hereafter have to be inquired
(339) into, but shall be fixed at the sum of $150, with interest from the time of the cutting, in the event that plaintiff is adjudged entitled to recover in this cause. It is admitted that the lands embraced in Big Cypress Swamp are less in quantity than 2,000 acres. It is admitted that the swamp lands of Seven Creeks are more than 2,000 acres. It is also admitted that the swamp lands of Seven Creeks, together with that known as Big Cypress, is more than 2,000 acres. It is also further admitted that the swamp lands in Big Cypress are not as much as 2,000 acres, but 400 or 500 acres."

As it was agreed that there is no substantial conflict in the evidence, it is not necessary to set it out more than to state that it shows that Big Cypress, Horse Branch, Bear Branch, and several other swamps or branches, bordered by marshy land, empty their waters into Seven Creeks swamp or branch, called by some of the witnesses the large stream, and in this way only are they connected. Plaintiff contends that this constitutes but one large swamp containing more than 2,000 acres, and, therefore, not subject to entry under our law, and, if this is so, the grant to Stevens is void. Defendant, on the contrary, contends that these are all separate swamps, each having a distinct identity, and not being part of Seven Creeks, save and except in the sense that it empties its waters into that stream and contributes in this way to its formation.

The sections of ch. 39, Revisal of 1905, codified from former laws, are as follows:

"Sec. 1693. *Lands not subject to entry.* Marsh or swamp lands, where the quantity of land in any one marsh or swamp exceeds 2,000 acres, or where, if of less quantity, the same has been surveyed by the State or the State Board of Education, with a view to draining and reclaiming the same."

"Sec. 1694. *Lands subject to entry.* Marsh or swamp lands lying in a swamp where the quantity of land in that swamp or marsh does not in the whole swamp or mash exceed 2,000 acres, and which has not been surveyed by the State or State Board of Education, and marsh or swamp lands, unsurveyed as aforesaid, not exceeding 50 acres in one body, though lying within a marsh or swamp of a greater number of acres than 2,000, may be entered, when the same shall be situated altogether between the lines of tracks heretofore granted."

"Ch. 39, sec. 1699. *Void grants.* Every entry made and grant issued for any lands not authorized by ch. 37 to be entered or granted shall be void."

It is provided by Revisal, sec. 4047, as follows:

"Title to all swamp lands, in all controversies and suits to which the State Board of Education, or its assigns, shall be a party, is presumed to be in that corporation, or its assigns, until the other party shall show that he hath a good and valid title to such lands in himself."

It seems to us that, within the true meaning of those statutes, (340) Big Cypress and Seven Creeks are separate and distinct swamps. The circumstance that, sometimes during freshets or high water all of these swamps are covered with water, cannot alter the case. It is not unlike the case of three or more streets connecting with a large thoroughfare, or several branches, creeks or even rivers flowing into a larger river or larger body of water, each having, though, a separate existence, and called by a different name. If this were not so, there might be a chain of these swamps, or creeks, as they are sometimes called, connecting with each other, and extending over an immense area, and all would be regarded in law as one and the same swamp. It would seem that this construction is what the statute was intended to prevent, when the Legislature used the words, "where the quantity of land in any *one* marsh or swamp exceeds 2,000 acres." It is true that some of the witnesses have expressed their legal opinions upon the subject, but they substantially agree upon facts that show Big Cypress and Seven Creeks to be, in legal contemplation and within the purview of the statutes, distinct swamps, the former being but tributary to the latter, and not a part of it.

We can derive little or no aid from the decided cases. The findings of fact, which were made with the consent of the parties, show that Big Cypress begins as a very narrow stream some distance above Seven Creeks, and widens considerably at a point between its beginning and Seven Creeks, narrowing as it empties its waters into the latter stream at an angle of about ninety degrees. Swamp lands may be defined as those too wet for cultivation and requiring drainage to fit them for that purpose. 37 Cyc., 653, 654; *Sav. Union v. Irwin,* 28 Fed. Rep., 708, 712 (App. in 136 U. S., 578); *Miller v. Tobin,* 18 Fed., 5 Rep., 609, 614 (9 Lawyer, 401). The lands which are embraced by what is called in the case Big Cypress are of that character and come well within the description of swamp lands, and, while its waters flow into Seven Creeks, it is otherwise so disconnected with it as to be quite apart from it and a different entity. If we should take the other view, the conformation of larger bodies of such lands in the State is such that it might withdraw from entry vast areas of vacant land which was evidently intended for the settler. We think that, of the two, the view taken by the court below is the safer one and more in agreement with the legislative intent as expressed in the statutes above quoted. As the number of acres in Big Cypress is less than 2,000, and as the land had not been surveyed by the State, or the State Board of Education, for draining with a view to its reclamation, the entry and grant of S. C. Stevens are valid, and there was no error in so deciding.

Affirmed.

ALLEN, J., not sitting.

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C. E. ESTES v. ARTHUR RASH AND WIFE, MAMIE RASH.

(Filed 8 December, 1915.)

1. Process—Want of Service—Judgments—Motions—Appeal and Error.

A motion to set aside a judgment rendered in the court of a justice of the peace, made before that court, for failure of service of summons, is proper; and where the magistrate has found as a fact that there had been proper service of the summons, which is confirmed in that respect on appeal to the Superior Court, but the judgment is set aside on another and jurisdictional ground, the appeal involves only the question of the proper service of the summons, and, on appeal to the Supreme Court, the Superior Court judgment will be set aside and leave in force the magistrate's judgment.

2. Judgments—Motions to Vacate—Meritorious Defense.

Where, on appeal from a judgment rendered in the lower court, it is held that the judgment is a nullity, it is unnecessary for the defendant to show that he has a good and meritorious cause of action for a new trial to be ordered.

3. Appeal and Error—Rules of Court—Pauper Appeals—Briefs—Records.

An appeal to the Supreme Court will be dismissed if the appellant fails to comply with the new rules of practice therein, requiring that appellant, in pauper appeals, when docketing the appeal, shall file six typewritten copies of the record, including case on appeal and briefs; and that the brief of the appellant be prefaced by a clear and concise statement, showing the nature of the case and the facts bearing upon the assignments of error; and this is required whether the appellant may have received notice of the rule from the Supreme Court clerk or not.

APPEAL by defendant from *Adams, J.*, at July Term, 1915, of AVERY.

Civil action tried before a justice of the peace and carried to the Superior Court of Avery County, by appeal of the *feme* defendant from the denial of a motion by her to set aside the judgment of the justice, and heard in the latter court.

J. W. Ragland for plaintiff.

L. S. Benbow for defendant.

WALKER, J. The question in dispute was whether the summons had been served on the defendant, Mamie Rash. Affidavits were filed by the respective parties. The justice found as a fact that the summons had been duly served, and refused to set aside the judgment, and defendant appealed. In the Superior Court the motion was heard upon the affidavits, and the judge also found as a fact that the summons had been duly served. The officer to whom the process had been directed returned thereon that it had been received by him on 23 June, 1914, and served on both defendants, naming them, at 7 o'clock p. m. on the same day. The judge held that the defendants' remedy was by a civil action, and not by a motion, upon the ground, we assume, that the de- (342) fense to the action which is set up by the *feme* defendant indicated that she intended to show, by parol evidence, that she signed the mortgage on the land of her husband for the purpose of releasing any marital interest she had in the same and not for the purpose of becoming bound for debt, and, as this varied and contradicted the written contract, it could not be done (*Royal v. Southerland,* 168 N. C., 405), but the *feme* defendant should have proceeded beforehand by an action to have the instrument which evidenced a promise to pay the debt corrected or reformed so as to express the true intention of the parties, if it had

been otherwise written by their mistake, or by her mistake, induced by the fraud of the other party. But the court having found that the summons had been duly served, it was not necessary to decide any other matter, as this finding was quite sufficient to dispose of the appeal from the justice. The defendant could proceed by motion to have the judgment set aside. *Everett v. Reynolds,* 114 N. C., 366; *Insurance Co. v. Scott,* 136 N. C., 157. *Currie v. Mining Co.,* 157 N. C., 217, and the more recent cases of *Ballard v. Lowry,* 163 N. C., 487, and *Lowman v. Ballard,* 168 N. C., 16, in the last of which the subject is fully discussed by *Justice Hoke* with a full citation of authorities.

"If the judgment is rendered in the absence of the defendant, and the process is defective, or there is the appearance of service when in fact there was none, the defendant may move before the justice to set the judgment aside." *Thompson v. Notion Co.,* 160 N. C., 525. But while we hold that the remedy was the proper one, the justice and judge having found the fact against the defendant, there was nothing left to do but to refuse to set aside the judgment, affirming thereby the decision of the justice. The plaintiff suggests that defendant has not shown, *prima facie,* that she has a valid or meritorious defense. (*Stockton v. Mining Co.,* 144 N. C., 595; *LeDuc v. Slocomb,* 124 N. C., 351; *Pepper v. Clegg,* 132 N. C., 313), and he asks, why set aside a judgment if the court must immediately render the same judgment again? Will the law do a vain thing? *Minton v. Hughes,* 158 N. C., 587. But these cases have no application here, as the ground of the motion is that the process was not served on the *feme* defendant, and as this has been found to be the fact, it was void as to her, a mere nullity. In such a case it is not required that the party against whom the judgment was entered, and of whose person the court had not acquired jurisdiction, should show merits. *Flowers v. King,* 145 N. C., 234.

Where the ground of the motion to vacate the judgment is irregularity or excusable neglect, it must be shown, at least *prima facie,* that the party has a valid defense, as the above cited authorities will show. See, also, *Becton v. Dunn,* 137 N. C., 559, 562; *Wolfe v. Davis,* 74 N. C., 597.

This is not so where the judgment is void for want of jurisdic-
(343) tion. Black on Judgments, sec. 348; *Dobbin v. McNamara,* 113 Ind., 54; *Roberts v. Pawley,* 50 S. C., 913.

So it follows that we would affirm the judgment should we consider the case upon the legal merits involved in the motion, but we must dismiss the appeal for noncompliance with the recent rule of this Court requiring the clerk to notify all those who appeal *in forma pauperis,* when docketing appeals, to file six typewritten copies of the record, including case on appeal and briefs, for the use of the clerk and the judges of this Court. We have found it necessary to adopt this rule in order

that we may intelligently transact the business of the Court, by a fair understanding of the case as the argument of counsel proceeds. All briefs of appellants should be prefaced by a clear and concise statement, showing the nature of the case and the facts bearing upon the assignments of error. The rule of this Court positively *requires* this to be done, and we again direct attention to it, as it has not been observed in many cases, and it must be complied with. A brief not containing such a statement does not conform to the rule, and hereafter the latter will be strictly enforced, as a compliance with it is so essential in the hearing of causes, and is quite indispensable. This applies to all appeals. Recently we have adopted a rule in regard to filing copies of records and briefs in pauper appeals of which parties and their counsel will take notice, without any special warning from the clerk. There must be, under this rule, six copies each of the record and the appellant's brief. The clerk has informed us that appellant in this case had received notice of the rule, and, not having complied with it, we dismiss the appeal.

Appeal dismissed.

Cited: Bank v. Brock, 174 N. C., 548 (2p, b); *Cahoon v. Brinkley,* 176 N. C., 10 (2p, b); *Covington v. Hosiery Mills,* 195 N. C., 480 (3f); *Taft v. Covington,* 199 N. C. 58 (g); *Powell v. Turpin,* 224 N. C. 70 (1b); *Bennett v. Templeton,* 226 N. C. 678 (1p).

RICHMOND GUANO COMPANY v. JOHN T. BENNETT.

(Filed 8 December, 1915.)

Attorney and Client—Additional Services—Implied Promise to Pay—Trials—Questions for Jury.

Where an attorney has obtained judgment in favor of his client upon an agreed fee, and in writing therefor he states that the judgment debtor has land in an adjoining county, and in view of the largeness of the amount involved he had deemed it expedient to have the judgment recorded in the adjoining county, though not necessary, which he had done, and thereafter the judgment debtor, in making a sale of the land to a stranger, was compelled to pay the amount of the judgment in full, which the attorney received, but in transmitting it to his client retained a commission of a certain per cent upon the amount collected as a further fee for additional services rendered in an action by the creditor to recover the fee retained, it is held as reversible error for the trial judge to submit only one issue, as to the value of the services rendered upon an implied promise to pay, it being first necessary for them to determine an issue as

to whether the further services were rendered with the intent of both parties that there should be no charge therefor.

CLARK, C. J., dissenting.

(344) APPEAL by plaintiff from *Devin, J.*, at May Term, 1915, of RICHMOND.

Civil action. The action was to recover the sum of $350, which plaintiff alleged that defendant had wrongfully retained as commissions and attorney's fees on a collection of $2,990.28, paid into office on a judgment in plaintiff's favor against John and D. M. Morrison.

Defendant contended that said amount was a legitimate charge for services as attorney and that nothing was due plaintiff.

On issue submitted, the jury rendered the following verdict:

"What amount, if any, is defendant, John T. Bennett, entitled to retain out of the money collected on plaintiff's judgment against John and D. M. Morrison? Answer: $300."

On the issue, the judge, among other things, charged the jury as follows: "The present question of fact for you to pass upon is as to the amount. Where services are rendered by one person which are valuable and which are accepted by another person, it implies a contract to pay what the services are reasonably worth, and so, in this case, the defendant's right to retain money out of the amount collected is based upon an implied contract upon the part of the Richmond Guano Company, a contract implied by law to allow him to retain what his services were reasonably worth; this is the question for you to pass upon from the evidence"; and this constitutes plaintiff's fifth exception.

"You will consider all the evidence in the case; you will give Bennett the amount contended for by Bennett, or you will say from the evidence what the services are reasonably worth"; and this constitutes plaintiff's sixth exception.

Plaintiff, having duly excepted, assigns these portions of the charge for error.

Manning & Kitchin and Lowdermilk & Dockery for plaintiff.

J. A. Lockhart for defendant.

HOKE, J., after stating the case: There were facts in evidence tending to show that plaintiff held a note for $2,895.60, drawing interest from 10 December, 1912, against John and D. M. Morrison, the collection of which seemed to be in some doubt, and the holders having consulted defendant, a practicing attorney of the Richmond County bar, as to the course to be pursued, it was determined to reduce the claim to judgment, defendant agreeing to do this for $100, and a deposit with

the clerk of the court of $10, to cover cost of summons, etc. The $10 and note were forwarded.

Defendant obtained the judgment and had a transcript docketed in the adjoining county of Scotland and, in a letter to plaintiffs, of 12 April, 1913, among other things, said that he had obtained the judgment and "that, in order to take every precaution, I am having a transcript docketed in Scotland County, where they own some land. I don't (345) think this is absolutely necessary, but I don't care to take any risk on an amount as large as this. I will be glad to have your check for $100, etc., as I need that amount, etc." There were other letters between the parties relevant to the issue. Thus, on 6 June, defendant wrote saying, among other things: "I am informed that they (the judgment defendants) are negotiating the sale of some property at a handsome figure, so I take it they will have to lift the judgment before the sale goes through. I had not overlooked the matter and will be on the job until you realize the amount of your claim." The $100 was sent and receipt acknowledged, and later, 4 July, 1913, the judgment debtors, having made an advantageous sale of a body of land owned by them in Scotland County, it became necessary to discharge the lien created by plaintiff's judgment docketed in the county, and same, to the amount of $2,990.28, was paid on the judgment into the office in Richmond County, and when defendant, having receipted for same, forwarded to plaintiff the amount, less fees of $450 retained for further services, plaintiff returned check, claiming that the $100 already paid covered the attorney's charges, and the sum less the fees, the subject-matter of the litigation, seems to have been again paid over, leaving the question as to this charge to be determined by suit. Defendant, in the course of his evidence, among other things, testified:

"After writing the letter of 12 April (in which plaintiff was notified that judgment had been obtained) the only service that I rendered was having the judgment docketed, that is, a transcript of the judgment sent to Scotland County," and later: "The only service rendered by me, in addition to obtaining the judgment, was to have a transcript sent to Scotland County, and receipting for and forwarding the money, and for this I charged $350, etc."

In *Winkler v. Killian,* 141 N. C., at page 578, in reference to the promise to pay usually implied by the law in case of services rendered, the Court said: "It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth. This is a rebuttable presumption, for there is no reason why a man cannot give another a day's work as

well as any other gift, if the work is done and accepted without expectation of pay."

Speaking to the same subject in *Prince v. McRae,* 84 N. C., 675, *Chief Justice Smith,* delivering the opinion, said: "Whether plaintiff's services shall be deemed a gratuity or constitute a claim for compensation must be determined by the common understanding of both parties. If they were intended to be and accepted as a gift or act of benevo-
(346) lence they cannot at the election of plaintiff create a legal obligation to pay, etc." And, in that case, the question was left to the jury to determine.

Applying the principle approved in these and other decisions of like kind, we are of opinion, that, on the facts presented in the record, there was error in the ruling of his Honor that the only question for the jury to determine was the reasonable value of the services rendered, and that the issue as to defendant's liability also must be referred to the jury on the question whether any services, after procuring the judgment, were rendered and received in expectation of being paid for, or were they rendered with the intent and understanding of both parties that no further charge should be made in addition to the $100 already received.

And, if this is decided for defendant, then the question of amount shall be also determined by the jury on the basis of what such additional services were reasonably worth.

There must be a new trial of the issue, and this will be certified, etc.

New trial.

CLARK, C. J., dissenting: The defendant, by letter, contracted with the plaintiff as follows: "I will reduce the claim to judgment for $100 and a deposit of $10 with Thomas L. Covington, clerk of our Superior Court, to cover court costs advanced to get service of summons." The plaintiff accepted the terms, sent the note and deposit fee; the action was brought and judgment obtained without contest. Thereafter the defendant wrote the plaintiff, "I will have a transcript of this judgment docketed in Scotland County where they own some land. I don't think this is absolutely necessary, but I don't care to take any risk with an amount as large as this. I will be glad to have your check for $100." This was his bill, as per contract.

The check for $100 was promptly sent. On 17 April, 1913, the defendant acknowledged receipt of the $100 and wrote that he had docketed the transcript in Scotland "in order that every precaution might be taken to enforce this judgment in case the same was not paid according to agreement. I think we will get the money without having to issue execution." The defendant testifies: "The money was paid into the clerk's office here. I receipted the clerk here for the money on 13 June,

1913. . . . After writing the letter of 12 April the only service I rendered was to have the judgment docketed—that is, a transcript of the judgment sent to Scotland County." The following question was asked the defendant: "What other letter or act, if anything, did you do, except to send a transcript to Scotland County of the judgment taken in Richmond County, and also receipt the clerk of the court here for the money? A. I think that is all, and for that service I charged the additional fee of $350. For issuing the summons, filing the complaint, and obtaining judgment and having it docketed here in this court my charge was $100."

It will thus be seen from the defendant's evidence and his cor- (347) respondence that he agreed to reduce the claim to judgment for $100. This was done and his fee was paid. The docketing of the judgment was done by the clerk as required by law, Rev., 573, and sending it to Scotland County, which was done by the clerk, at the instance of the defendant, was a very proper act to secure the lien. This involved no labor or legal knowledge. At any rate, if it was not within the contract of the parties, which was ended, it was a generous but gratuitous act for which he was not entitled to charge without the consent of the plaintiff. He wrote the plaintiff he did not think it necessary. If the defendant thought he should have been paid for doing this he should have submitted the matter to his client. No labor had been done, yet the defendant deducted $350 from plaintiff's money, without his consent, for this unnecessary act, as he wrote plaintiff, of having the transcript sent to Scotland County.

Upon the evidence the judge should have directed the verdict for the plaintiff. The courts are for the administration of justice. Lawyers are very necessary in the dispatch of public business and entitled to just compensation, but the courts are not operated for the purpose of rendering them compensation. The main object is to serve the public. It is of the utmost importance that clients shall feel that in the courts they will not be put to any disadvantage in dealing with counsel.

There is no doubt that the defendant thought that the plaintiff should pay him $350 because the money was collected and his agreement was merely to reduce the claim to judgment. But on his own evidence the defendant had nothing to do with the collection, for it was paid into office without any action on his part and without any request by the plaintiff that he should take any action. There was no contract, express or implied, for which he was entitled to take $350 out of the money in the clerk's office, which had been paid in as the property of the plaintiff.

There was nothing done at the request of the plaintiff except what was paid for under the contract by the check for $100. When the defendant wrote the plaintiff that he thought the act of sending the tran-

script to Scotland County was unnecessary, it was in substance a statement that he was not doing an act requiring payment. The plaintiff could not have understood that he would be charged $350 for this. There is nothing to be submitted to the jury, for there was no express contract and none implied. If the defendant should have compensation for this it was a gratuitous act for which his recourse is on the sense of justice on the part of the plaintiff.

Cited: Sanders v. Ragan, 172 N. C. 614 (1).

(348)

G. P. CAMPBELL v. CAMILLA SIGMON.

(Filed 8 December, 1915.)

1. Contracts, Written—Deeds and Conveyances—Parol Evidence—Statute of Frauds.

A grantor, 84 years of age at the time, executed a conveyance of his land to his daughter, then living with him with her son, the deed being in fee and in the usual form, with a recited consideration and covenants and warranty of title. In this action to set aside the deed there was no allegation or proof of undue influence or fraud, but that grantor was tired of the presence of the son and made the conveyance as a device to get rid of him: *Held,* evidence of declarations made by the grantor two weeks before the execution of the deed, and made by him without reference to it, that he wanted to get rid of his grandson, was properly excluded, as a contradiction of the written instrument.

2. Appeal and Error—Exceptions—Briefs.

Exceptions not mentioned in the appellant's brief are taken as abandoned. Rule 34.

3. Contracts, Written—Parol Evidence—Declarations—Statute of Frauds.

Evidence of declarations of a grantor in a deed to lands, made after its execution, to show that he only intended the deed as a device to rid him of the presence of his grandson, and that he would get the deed back, is incompetent as an attempt to contradict the written instrument by parol.

4. Evidence—Silence—Quasi Admissions.

The silence of the grantee in a deed upon information given him concerning the purposes of the deed as stated by the grantor after he had executed it is not a *quasi* admission of the facts stated, the one stating them being a witness for the party seeking in his suit to declare the deed inoperative.

5. Deeds and Conveyances—Grantor in Passion—Evidence—Permissive User.

Where a grantor of lands remains in possession after executing the deed, paying taxes thereon and listing the lands in his own name, and paying no rent, it is *held* that, in the absence of evidence of a parol trust, or of fraud or undue influence, such possession was not inconsistent with a permissive occupancy of the property by the grantee, and, under the circumstances of this case, it afforded no evidence that the deed was invalid.

6. Trusts and Trustees—Grantor—Parol Trusts—Evidence—Statute of Frauds.

A grantor of a fee-simple title in lands cannot engraft upon that title a parol trust in the lands in his own favor, for such is a contradiction of the writing by parol inhibited by the statute of frauds.

7. Evidence—Deeds and Conveyances—Consideration—Parol Evidence.

The recited consideration and its receipt in a deed to lands is not regarded as a part of the conveyance, and may be contradicted by parol evidence.

APPEAL by defendant from *Justice, J.*, at May Term, 1915, of CATAWBA.

Council & Yount and C. L. Whitener for plaintiff. (349)
Self & Bagby for defendant.

CLARK, C. J. This was an action to recover a tract of 38 acres of land near Hickory which the plaintiff claimed under a deed in the usual form and with the usual covenants, executed by Paul Sigmon 4 September, 1904, duly acknowledged before a justice of the peace, and recorded in the register's office of Catawba, 13 September, 1904.

There seems to be no conflict in the evidence, which is substantially that the grantor, an old soldier of the war of 1861-65, was about 84 years old when he executed the deed, and that the defendant (who was one of several children) was living in the house with him, with her son; that she continued to live with him till his death, but that her son, at whom the old man had taken some offense, soon after the deed was executed moved into another house not far off. It was also in evidence that Paul Sigmon lived nearly ten years after the deed was made; that its execution was known to the family connection, which consisted of several children and grandchildren, that during the balance of his life he paid the taxes on the land and paid no rent for the premises, but that he never demanded of the plaintiff a reconveyance or reformation of the deed. There is no allegation or proof of undue influence or of fraud. The defense set up is that the grantor, being tired of the presence

of his grandson in the house (the son of the defendant), hit upon the plan of executing this deed to secure his departure.

The only issue submitted was: "Is plaintiff the owner and entitled to the possession of the land described in the complaint?" to which, upon the above evidence, the court rightly instructed the jury to respond "Yes."

The exceptions are to this instruction and the following exceptions to evidence:

Exception 1. The defendant offered to prove by Killian, the justice of the peace who took the acknowledgement of the deed, that a week or two weeks prior thereto the grantor said to him, "I am trying to get Pink away, and he won't go, and I am going to try to fix some plan to get him away." This was properly ruled out. The declaration was made a week or two before the execution of the deed and made no mention of the deed as the plan, and, if it had, this could not contradict the subsequent solemn act of executing the deed. This witness testified that he had been a justice of the peace for 34 years and was witness to the deed. "I written the deed and taken the acknowledgment in my office in Hickory; it was executed in my office; Paul Sigmon and Pink Campbell (the grantor and grantee) were present at the time. Mr. Sigmon and Mr. Campbell come to me to make a deed from Sigmon to Campbell,
and I written the deed and taken the acknowledgment; I didn't
(350) seen any money. I have no recollection of anything being said
by Paul Sigmon about the execution of this deed, or of the transfer of this land to Mr. Campbell, at that time, or any time before that." It was at this time that the above question was asked and properly ruled out.

Exception 2 does not appear in the appellant's brief, and is therefore taken as abandoned. Rule 34, 164 N. C., 551.

Exception 3 is to the exclusion of the testimony of the witness Deitz, by whom the defendant offered to prove a conversation with the grantor six years after the deed was made and three years before this suit began in which the grantor had said that though he had made a deed to the plaintiff, he was to hand it back. This was incompetent for parol testimony as to a declaration of the grantor could not invalidate his prior conveyance.

Exceptions 4, 5 and 6 are to the exclusion by the court of the evidence of Deal, Whitener, and Webb, of declarations to the grantor that he had made the deed to Campbell, but that it was to be returned to him.

Exceptions 7 and 8 were to the exclusion of the offered evidence of the witness Webb, that he told Campbell what Sigmon had said about the deed and that Campbell did not reply. This was not such an occasion that the party addressed was called upon to answer, and, therefore, his

silence was not a *quasi* admission. It appears that the witness Webb told Campbell that he was under subpœna at the time, as a witness for the defendant, and it may have been prudent and wise not to get into controversy with him. It is not like the case where one is charged with a crime and remains silent. In such case, except under unusual circumstances, a failure to deny the charge is a *quasi* admission.

Upon the whole evidence there was nothing which the court could submit to the jury to show that there was a parol trust to the grantor. There was no declaration of such trust at the execution of the deed, which recited a consideration. The witnesses for the defendant testified that Campbell had said that he paid $1,000 for the land, and they testified that during those remaining years of his life they did not know of the old man having any money. The bare fact that he remained in possession of the land, paying taxes and listing the land for taxes in his own name and paying no rent, in the absence of evidence of fraud or undue influence would not justify setting the deed aside. Such acts are not inconsistent with a permissive occupancy of the property from the grantee. The circumstances are unusual, but so is the fact that the deed was at once recorded to the knowledge of the entire family connection, and that no steps were taken to set the deed aside. It was also in evidence that the grantor was sound in mind and body and remained such, doing daily labor up to his death, ten years later.

The charge of the court is fully justified by the elaborate discussion as to the invalidity of a parol trust in favor of the grantor by *Hoke, J.*, in *Gaylord v. Gaylord,* 150 N. C., 222. After a thorough dis- (351) cussion of the authorities, *Judge Hoke* thus sums up the law in this State: "The seventh section of the English statute of frauds, which forbids the creation of parol trusts or confidences of land, etc., unless manifested and proved by some writing, not having been enacted here, and there being no statute with us of equivalent import, such trusts have a recognized place in our jurisprudence, but they cannot be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title to lands and giving clear indication on the face of the instrument that such a title was intended to pass," adding thereto the following: "Upon the creation of these estates, however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake, or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass."

The above is cited verbatim as authority in *Jones v. Jones,* 164 N. C., 322. It is also said, in *Cavenaugh v. Jarman,* 164, N. C., 375, "If there

was no estoppel the plaintiff could not establish a parol trust in his own favor against the grantee in his deed," citing *Gaylord v. Gaylord, supra.*

Among the many cases cited in *Gaylord v. Gaylord* are *Squire v. Harder,* 1 Paige, 494, which held, "Supposing the deed in question to have been in the common form, the recital of a consideration and the declaration of the use to the grantee and her heirs in the *habendum* are both conclusive between the parties and exclude any resulting trust to the grantor," and citing, also, *Wilkinson v. Wilkinson,* 17 N. C., 378, in which *Gaston, J.,* held that the recital of a valuable consideration is conclusive on the parties and those claiming under them unless it is shown to have been introduced by mistake or fraud.

Indeed, if, notwithstanding the solemn recitals and covenants in a deed, the grantor could show a parol trust in himself it would virtually do away with the statute of frauds and would be a most prolific source of fraud and litigation. No grantee could rely upon the covenants in his deed. It is true that the recital of the amount of the consideration or of its receipt can be contradicted in an action to recover the purchase money, but that is because this is no part of the conveyance. *Barbee v. Barbee,* 108 N. C., 581, and citations thereto in the Anno. Ed. This case is cited in *Gaylord v. Gaylord,* 150 N. C., 226, and in *Jones v. Jones,* 164 N. C., 324.

We have discussed the exceptions to the exclusion of the evidence, but if the evidence had been admitted the instruction to the jury should have been as given.

No error.

Cited: Walter v. Walters, 172 N. C. 330, 331 (6f); *Allen v. Gooding,* 173 N. C. 96 (6d); *Thomas v. Carteret,* 182 N. C. 380 (6p); *Thomas v. Carteret,* 182 N. C. 393 (6j); *Pate v. Gaitley,* 183 N. C. 264 (7f); *Blue v. Wilmington,* 186 N. C. 326 (6f); *Williams v. McRackan,* 186 N. C. 384 (6j); *Tire Co. v. Lester,* 192 N. C. 647 (6f); *Loftin, v. Kornegay,* 225 N. C. 492 (6f); *Westmoreland v. Lowe,* 225 N. C. 555 (7l); *McCullen v. Durham,* 229 N. C. 424 (6f).

(352)

WILSON AND PULLEN v. H. G. HOLDING, COUNTY AUDITOR.

(Filed 24 November, 1915.)

1. County Commissioners—County Auditors—County Expenses—Contracts—Special Auditing—Approval by Auditor—Counter-signature—Statutes—Constitutional Law.

Revisal, sec. 1379, enacted in pursuance of the provisions of Art. VII, sec. 2, of our Constitution, giving the commissioners of a county a general supervision and control of its finances, invests the board with full power to direct the application of all moneys arising by virtue of ch. 25, "for the purposes therein mentioned, and to any other good and necessary purpose for the use of the county," and includes within its terms the right of the board, in its discretionary power, to contract with skilled expert accountants for the auditing of the books and accounts of the various departments of the county at a price agreed upon, and empowers them to order that the same be paid by the county treasurer out of the county funds.

2. County Commissioners—Discretionary Powers—Courts.

The courts cannot interfere with the exercise of the discretion of the boards of county commissioners in ordering an investigation by public accountants of the books of the various departments of the county government, authorized by Revisal, sec. 1379.

3. County Commissioners—County Auditor—Approval—Counter-signature—Interpretation of Statutes.

Various acts of the Legislature relating to the same subject-matter should be construed, when possible, so as to bring them into harmony with each other; and it is *held* that the Public-Local Laws of 1911, ch. 452, as amended by the Act of 1913, ch. 306, creating the position of auditor for Wake County, to be appointed by the board, and, "under its control and discretion," and providing, among other things, that it shall "be his duty to audit all bills and claims presented to the board . . . and no claim or bill filed . . . shall be allowed or paid until it has been audited by the said auditor; and all warrants . . . shall be countersigned by him," should be construed in connection with Revisal, sec. 1379, giving the board of county commissioners control of the county finance, etc., and that, so construed, it does not take from the commissioners the power to contract, in their discretion, for a necessary county expense; though it is proper that the account be first referred to the county auditor for his investigation, approval and counter-signature, under the direction of the statute.

4. Mandamus—County Auditor—County Commissioners—Alternate Mandamus.

A peremptory *mandamus* will not issue to the auditor of Wake County to compel him to approve and countersign an account for an indebtedness arising under contract made by the county commissioners in a sum certain and passed upon and approved by them, without first referring the claim to him for auditing and reporting to the board; and, in this

case, an alternate writ is directed, requiring him to countersign the claim or show cause why he has not done so, giving him time to examine witnesses under the statutory authority given him, if he so desires; and, should he continue to refuse, it is within the power of the commissioners to order him to do so, that the treasurer may pay the claim.

5. Same—Appeal and Error—Costs.

The costs on appeal in this case are taxed equally between the parties, it being decided that an alternative writ be ordered to issue in the lower court, to the county auditor of Wake, to audit and countersign an account ordered by the county commissioners to be paid, and that the relief of a peremptory *mandamus* was properly refused.

(353) APPEAL by plaintiffs from *Peebles, J.*, at September Term, 1915, of WAKE.

Civil action for a mandamus, heard upon a case agreed.

The board of commissioners of Wake County, wishing to make a general and thorough investigation of the records of the board, and of the register of deeds, treasurer and other officers of the county, to ascertain how the county affairs had been managed and the funds had been expended, authorized its chairman to employ expert accountants for the purpose, which was done, and plaintiffs were selected by the chairman and contracted to do the work, and, after having performed the service and made a full report thereof to the board, they presented the bill for their services to the board of commissioners, which was approved by the board, and on 6 July, 1915, ordered to be paid by the county treasurer. This bill was duly presented to the defendant, as auditor of the county, under the statute, and he refused to audit the same, giving the following reasons substantially for his said refusal: That the services rendered by the plaintiffs, under the contract with the board of commissioners, did not constitute a legal charge against the county, and that the bill as filed by plaintiffs contained no itemized, detailed or sufficient showing as to what services they had performed, and did not constitute a sufficient voucher to support a warrant for the payment from the treasury of Wake County of the amount necessary to pay the said bill, and was not sufficient to constitute a perpetual record of Wake County relating to the disbursement proposed; and that, in the opinion of the auditor, if the services were rendered pursuant to the provisions of subsection 5, section 1398, Revisal of 1905, they would constitute a valid charge against Wake County, but that the bill should show that they were so rendered and performed, and all of the services stated in bill were not rendered under subsection 5, section 1398, Revisal of 1905. When the account was first presented by the plaintiffs to the auditor to be countersigned he requested them to amend by showing if the services or any of them were rendered under Revisal, sec. 1398, subsection 5, or

under any other section of the statutes, and, if so, what section, and this request was renewed on 10 July, 1915, after the board of commissioners for the county had passed this resolution: "That the order heretofore passed, ordering the payment of $638.43 to Wilson & Pullen, incorporated, be amended by adding the words, 'and the board finds as a fact that this amount is for a necessary expenditure (expense) of (354) the county.'" There was no compliance with the request.

The auditor contended below, and also in this Court, that the law, at present, does not contemplate or authorize the employment of special accountants, as ample provision is made for a thorough examination of all records and accounts by the statutes as they now exist, and he relied upon Revisal, sections 1318 (5), 1389, 1390, 1391, 1398, 2779, 2781, and Public Laws 1915, ch. 286, sec. 108. He also contended that he was appointed as auditor of the county of Wake under Public Local Laws 1911, ch. 452, as amended by Public Local Laws 1913, ch. 306, and that by said acts ample provision is made for investigating and auditing all of the records and accounts of the county and all bills presented against it by him as auditor. Among the duties imposed on him by the said act are the following: "That he shall act as accountant for the county, settling with the county officers; and supervise, scrutinize and examine, at least once in every calendar month, all books, accounts, receipts and vouchers, and other records of all the officers of Wake County which show fees and commissions collected and received by them; and examine, at least twice each year, the dockets of all justices of the peace and mayors of said county, and report his findings to said board of county commissioners; and he is hereby authorized to administer oaths on verification of claims which may be filed against the county, and board of education of Wake County, and open a set of account books, in which shall be shown the total monthly receipts of fees and commissions of all the officers of said county in an expert and intelligent manner, assigning distinct and separate accounts for each and every of said officers, which books shall be permanently kept as the records of his office and always open to public inspection."

The plaintiff contended that by the Constitution of the State and the statutes passed in pursuance thereof, general supervision and control were given to the board of county commissioners over all county affairs, and especially in regard to the county finances, it being the highest governing body, having jurisdiction, so-called, and general supervisory power, over all the other officers, where the management of county affairs and the expenditure of money are involved, with some few exceptions not applicable to this case. Their claim is rested upon Constitution, Art. VII, sec. 2, giving to the board control of the "county finances," and Revisal, sec. 1397, giving it "full power to direct the ap-

plication of all moneys arising by virtue of Revisal, ch. 25, for the purposes therein mentioned, and to any other good and necessary purpose."

Plaintiff also relies on a provision of the statute creating the office of auditor for Wake County, being Public Local Laws 1911, ch. 452, as amended, Public Local Laws 1913, ch. 306, which reads as follows: "It shall likewise be his duty to audit all bills and claims presented
(355) to the board of county commissioners of said county and the said board of education for payment, and no claim or bill filed with said board of commissioners or said board of education shall be allowed or paid until it has been audited by said auditor; and all warrants drawn upon claims or bills allowed by said board of commissioners or by said board of education shall be countersigned by said auditor before they shall be honored or paid by the treasurer of the county." And further, in section 17, "Said auditor shall hold office under the control and direction of the said board of commissioners for said county." It is provided by Public Local Laws 1913, ch. 306, sec. 6 a: "No fees, salary, or compensation or other charges, other than are provided for in and fixed by said chapter 452, shall be audited or paid out of the general county fund or road fund of Wake County by the treasurer of said county, except by and with the authority, consent, and approval of the board of commissioners for Wake County."

The court, after hearing argument of counsel, refused to grant the writ of *mandamus,* and plaintiff appealed.

Cox & Cox for plaintiffs

R. N. Simms, W. B. Snow, and Manning & Kitchin for defendant.

WALKER, J., after stating the case: We have not the slightest doubt that the defendant has refused to audit the plaintiff's claim from the best motive, that of faithfully and honestly discharging his duty as a public officer of the county, and he should be highly commended for it. The question upon which we are asked our opinion is whether, by a proper construction of the Constitution and statutes to which we have referred in our statement of the case, the defendant can, in law, refuse to countersign this claim, so that it can be paid by the county treasurer. The Constitution, Art. VII, sec. 2, requires the county commissioners to exercise a general supervision and control of the county finances, as may be prescribed by law, and Revisal, sec. 1379, invests the board with full power to direct the application of all moneys arising by virtue of ch. 25, entitled "County Revenue," "for the purposes therein mentioned, and to any other good and necessary purpose for the use of the county." It is our duty so to construe this section as to reconcile it with Public Local Laws 1911, ch. 452, as amended by the act of 1913, ch. 306, creat-

ing the office of auditor for the county of Wake, if it can be done, and we think it can be, even if there is an apparent conflict between them. The defendant sufficiently audited the plaintiff's claim in this case except as to the amount thereof, when he ascertained, as he did, that the board of commissioners had, through their chairman, employed it, as a corporation engaged in such work, to make an expert examination of the books of the county. This was done by the board with a laudable motive, and, as we think, for a perfectly proper and (356) legitimate purpose. They were not bound to confine their efforts to the specific method allowable under other statutes, but if the good of the county, in the exercise of their judgment, acting as they were for its best interests, required such an investigation to be made, it was clearly within their power to order it and to employ experts of great skill in such matters to make it. The statute provides that they may apply the county money to "any other good and necessary purpose." We have repeatedly held, beginning with *Brodnax v. Groom,* 64 N. C., 250, and ending with *Comrs. v. Comrs.,* 165 N. C., 534, and more recently *Hargrave v. Comrs.,* 168 N. C., 626, that what is a "necessary expense" for a county is to be determined by the sound judgment and discretion of its board of commissioners.

It was said by *Chief Justice Pearson,* as far back as the time when the case first cited was decided, "that the court has no power of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government, or upon the county authorities." And in *Comrs. v. Comrs., supra,* we 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." And in *Hargrave v. Comrs.:* "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 fault in the argument of the defendant is that it does not sufficiently distinguish between the power of the county commissioners, in their general control of him, and in the exercise of a superior authority, to direct him to pay a particular claim, contracted by the board, and the power he has to audit claims generally. Where the board of county commissioners, having created an obligation of the county itself for a good and necessary purpose, of which it is the judge, and fixed
(357) the amount of it, the duty of the auditor is fully discharged when, after ascertaining this fact, he countersigns the order upon the county treasurer, for the board had the power so to contract, and is the sole judge, as we have said, of the propriety and necessity of doing so, and of what shall be paid for the service. This but recognzies the supreme power and control of the board in such matters.

In this respect the case is not unlike that of *Halford v. Senter,* 169 N. C., 546, where *Justice Brown,* for the Court, said: "The Constitution of this State proscribes that a board of commissioners shall be biennially elected in each county. Such board is given 'a general supervision and control of the penal and charitable institutions, schools, roads, bridges, and of the levying of taxes, and of the finances of the county, as may be prescribed by law.' The commissioners constitute the local governing body of the county, and are directly responsible to the people who elected them. It is not only reasonable, but due to the people of the county, that these men, elected by them, should have supervision and control over the expenditures of a subordinate and nonelective board. It is not to be supposed that the General Assembly intended to deprive the taxpayers of a county of such necessary and proper protection and safeguards which are thus thrown around the county treasury." In one respect this case is stronger than that one, for the statute which creates the office of auditor for Wake County places the incumbent of it "under the control and direction of the board of Commissioners for said county." It is true that he is required to audit all bills and claims presented to the board of commissioners of said county before they are paid, but, in this case, the board had made the contract for the particular service, knew what it was and what to pay for it, and it cannot, therefore, be successfully urged that it required any more than a formal auditing by him, if any at all, and that he countersign it, unless we are prepared to hold that his authority and power over the payment of this claim is superior to that of the board.

If we should hold that the auditor could reject this claim, for that is what it will amount to if he refuses to audit it, the result would be that, for all practical purposes, and in a very effective way, he would com-

pletely supersede the board of commissioners in the control and management of county affairs, and it surely was not the intention of the Legislature in passing the act creating his office, that an appointive officer should take the place of and dominate those who had been elected by the people as their chief officers and clothed with supreme power in county government. The language of the statute implies that when bills are presented to the board of county commissioners they shall first be audited, for it provides that it shall be the duty of this officer "to audit all bills and claims presented to the board of county commissioners and the board of education for payment, and no claim or bill filed with said boards shall be *allowed* or *paid* until it has been audited by (358) him," and it further provides that all warrants drawn for claims or bills allowed by said boards shall be countersigned. This language indicates an intention that the auditor should assist the board of county commissioners in the examination of all bills and claims and ascertain whether, in his opinion, they are proper charges against the county, to the end that the board may determine whether a warrant or order for payment should be made, and if so, for how much; but the opinion of the auditor as to the validity of a claim is not conclusive on the board, for the statute expressly subjects him, in the discharge of his official duties, to "the control and discretion of the board." The position of auditor was created for the purpose of safeguarding the interests of the county in the allowance and payment of bills and claims presented against it, as well as for the other purposes mentioned in the statute, but the board must, at last, determine whether any particular claim should be paid, and, if so, how much of it, after considering the report upon it by the auditor, or any information derived from him or otherwise, and when it passes upon the claim and issues its order upon the treasurer it will be the duty of the auditor to countersign the warrant and of the treasurer to pay it.

There is nothing in the statute which will justify the inference that the auditor should *approve* the claim before it is allowed by the board. The power "to allow," that is, finally to determine the correctness and validity of the claim against the county, is left with the board, and the auditor merely examines the account, after hearing the parties concerned, by comparing the charges with the vouchers, taking testimony, if he deems it necessary, and stating the result. This defines the duty of an auditor as we find by reference to the dictionaries. He may, of course, be given larger powers by law, but in regard to county claims he is given only the power to investigate and report his findings to the board, which is strictly the duty of an auditor, and the board decides what shall be done with the claim. It is still the governing body of the county. The statute is not obscurely worded, but expresses clearly the

intention of the Legislature, and our construction of it will produce, we hope, more harmonious relations between the auditor and the board. We do not decide anything as to the board of education, for no such question is before us.

The view we have taken of the statute is further supported by the provision we have quoted at the end of the statement, to the effect that no fees, salary, compensation, or other charges for services, except as otherwise provided by law, shall be audited or paid out of the general county fund or road fund of the county by the treasurer, except by and with the authority, consent and approval of the county board of commissioners.

(359) As the board of commissioners did not proceed strictly according to the requirement of the statute by first referring this claim to the defendant, that he might audit the same and report the facts to the board, we will not order a peremptory *mandamus* to be issued, but, as there is *now* apparently no objection to the claim, we direct that the Superior Court issue an alternative writ to the defendant, requiring him to countersign the warrant of the board of county commissioners, or show cause why he has not done so, and, in the meantime, and in order to comply literally with the statute, the defendant may audit the claim by such investigation as he deems proper, and, for that purpose, the parties concerned will appear before him, if notified so to do. He will then report his findings to the board of county commissioners, and, if they still order the claim, or any part thereof, to be paid, and issue their warrant accordingly, he will countersign the same, so that it may be paid by the treasurer, and the judge will afford reasonable opportunity for the auditor to comply therewith. If he fails to countersign the warrant he will show cause for his failure to do so according to the mandate of the alternative writ. The costs of this Court will be divided equally between the parties.

Modified.

Cited: Edwards v. Comrs., 170 N. C. 451 (lg, 2g); *S. v. Jennette,* 190 N. C. 101 (g); *Avery County v. Braswell,* 215 N. C. 279 (4d).

F. B. LEGWIN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 8 December, 1915.)

1. Railroads—Negligence—Contributory Negligence—Proximate Cause—Questions for Jury.

Where a railroad company in connection with a lumber company has a spur track entering into the lumber company's yard, and there is evidence, in an action to recover damages for a personal injury, that, in leaving cars within the yard, the defendant left open spaces between them to enable the employees of the lumber company to pass and repass between them in going about their work, and that the plaintiff, such employee so engaged, before going between these cars, looked and listened as well as he could amid the customary noises of such a place, and, thus assured of his safety, went between two of these cars and was caught and injured by reason of the defendant's train of cars coming into the yard, which occurred at irregular intervals, without warning or signal, and backing into one of them, and without proper lookout on the train or in the yard to warn him, it is held that, upon conflicting evidence, the issues of negligence, contributory negligence, and proximate cause were for the determination of the jury.

2. Railroads—Contributory Negligence—Safe Place—Precautions.

Where it is shown that a railroad company left open spaces between cars placed in a lumber yard for the employees of the lumber company to pass in going about their work, and the plaintiff, such employee so engaged, was injured by the negligence of the defendant's employees in backing upon such cars, contributory negligence in bar of the plaintiff's right of action is not established by showing that had he gone from 60 to 70 feet around the cars he could have crossed in safety.

Beck v. R. R., 149 N. C., 168, cited and distinguished.

APPEAL by defendant from *Whedbee, J.*, at February Term, (360) 1915, of NEW HANOVER.

Civil action to recover damages for physical injury to plaintiff, caused by the alleged negligence of defendant company in backing certain cars into a siding and against other stationary cars therein without giving adequate warning and by reason of which plaintiff received the injuries complained of.

Defendant answered, denying any negligence of its part, and pleaded contributory negligence on part of plaintiff as the proximate cause of the injury. On the ordinary issues in these cases, negligence and contributory negligence, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

E. K. Bryan for plaintiff.

Davis & Davis for defendant.

HOKE, J. There were facts in evidence on part of plaintiff tending to show that there was a spur track from defendant road running into the yards of the Chadbourn Lumber Co., in the southern part of the city of Wilmington, this track leaving main line and curving sharply as it entered the yard from the east; that the shops, planing mill, etc., were on the south side of the track, six or eight feet therefrom, and the mill yard extended across the track for purposes of its work; that, in leaving cars, etc., in the yard, at and near the shops, it was the custom to leave a space between them so that the hands, having occasion to do so, could cross between the cars from one part of the yard to the other; that south of the track and between the shops and the main line, where the spur track left it, there were piles of lumber, obstructing the view towards the main line; that, at the time of this occurrence, there were three cars stationary on the spur, at or near the front of the shops, the first towards the east being an empty box car, then an unloaded flat car, and, last, a loaded box car, the spaces there having been left, as stated, for the convenience of the hands in passing from one part of the yard to the other; that about 5:30 p.m. on the afternoon of 13 March, 1913, plaintiff, at work on the north side of the track, had occasion to speak to the foreman in the shop, and crossed the spur track for the purpose, and, as he was returning, having looked for the approach of a train or engine and listened as far as he could when the shops and planing mills were in operation, and there being nothing to indicate the approach of an engine and no one of a train crew in evidence, he started back across the track and, as he did so, and just as he was between the drawheads or couplings of the flat and empty box car, an engine of defendant company, with two or more cars ahead, backed these cars against the empty car, crushing the plaintiff and causing permanent, serious and
(361) painful injuries; that this was done without adequate warning on the part of the engineer and without having any one on the cars as they approached or in the yard in a position to warn plaintiff or other hands who might be crossing the track at the time. The evidence tended also to show that there was no stated time when an engine might enter the yard for the purpose of delivering freight or taking off the loaded cars, and there was some evidence, also, on part of plaintiff, that the train crew, or a part of them, were in some kind of play at the time, and paying no attention to conditions as the engine, with the cars in front, moved into the yard on the spur track. There was testimony on the part of defendant that proper warning was given and that the conductor of the train gave full notice of its approach and personally notified plaintiff to get everything clear in the yard as the train was coming back, and

that he was standing in the yard at the time, but that plaintiff came out of the shop and between the cars so suddenly that the movement of the train backward, which had been already signaled, could not be stayed.

Upon this, the evidence chiefly relevant, the jury, under a correct and comprehensive charge, have accepted the plaintiff's version of the occurrence, and, this being true, we are of opinion that an actionable wrong has been clearly established.

Under *Johnson v. R. R.*, 163 N. C., 433; *Gerringer v. R. R.*, 146 N. C., 32; *Ray v. R. R.*, 141 N. C., 84; *Purnell v. R. R.*, 122 N. C., 832-840, and *Lloyd v. R. R.*, 118 N. C., 1010, and many others of like kind, it was a negligent act on the part of the company or its employees to back its train into a mill yard under the conditions presented.

In *Ray's case* the principle is stated as follows:

"It is a negligent act to back a train into a railroad yard where persons, passengers or others, are accustomed to stand or move about, either as a right or in the discharge of some duty, or by permission of the company evidenced by established usage, without warning of any kind and without having some one in a position to observe the condition of the track and signal the engineer or caution others in case of impending peril."

The jury, as stated, have found this breach of duty to be the proximate cause of plaintiff's injury; have absolved plaintiff from any culpable negligence on his own part, and we find in the record no valid reason for disturbing the results of the trial.

It was urged, among other things, that defendant's motion for nonsuit should have been allowed because, on the admitted facts, plaintiff, by going down the track a short distance, 60 or 70, or not more than 100 feet, could have passed in the rear of the loaded car and crossed the track in assured safety, and that on his own showing plaintiff was guilty of contributory negligence in endeavoring to cross the track between the cars, on the principle recognized in *Beck v. R. R.*, 149 N. C., 168, but an examination of *Beck's case* will disclose that the intestate (362) was killed in an attempt, for his own convenience, to cross the track between cars chained together on a live track in constant use, and it was held that, under such circumstances, intestate's death was properly attributable to his own lack of care. But no such conditions appear in this record. On the contrary, as heretofore stated, the testimony as accepted by the jury shows that the cars were separated, intentionally left so that employees might pass between them, and to our minds there is very little, if any, evidence of contributory negligence presented. In this and other aspects the case is not dissimilar to *R. R. v. Price*, 221

Fed., 828, to which we were cited by the diligence of counsel, and in which the principle more directly applicable is stated as follows:

"A railway station was situated between parallel tracks with a platform serving each track. From the platforms passageways led to a street crossing the tracks a short distance from the station. Adjoining the track on the south side of the station, and separated from it only by a fence, was a parkway, the property of the railroad company, which for many years was used with the company's permission by those going to and from the station in wagons and other conveyances, and the company had opened the fence and built and maintained a passageway from the parkway to the station platform, over which passengers passed from their vehicles to take trains on either track: *Held,* that the permission, or invitation, to persons going to the station to take a train on the north track, to cross the south track from such parkway placed upon the railroad company the duty to protect the plaintiff against the peculiar hazards of that way, as they might be increased or diminished by the movement of trains across it, and the measure of care and protection which they had a right to expect was not affected by the fact that other ways of reaching the station were provided, not requiring the crossing of the track on the company's premises"; and in that case, as in this, the question of contributory negligence was submitted to the jury on a proper issue.

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

No error.

Cited: Hinson v. R. R., 172 N. C., 649 (2d); *Hinson v. R. R.,* 172 N. C., 652 (2j).

(363)

MARY McSWAIN ET AL. v. W. W. WASHBURN, EXECUTOR, ET AL.

(Filed 8 December, 1915.)

Wills—Devises—Heirs of the Body—Rule in Shelley's Case—Deeds and Conveyances—Fee-simple Title.

A devise of tract of a certain number of acres of land on the west side of another tract of certain acreage, which can be ascertained and identified (*Stewart v. Salmonds,* 74 N. C., 519) under the terms, one half thereof to J. for life and the other half to M. "during her natural life and then to the heirs of her body," and at the death of J., then to M., and at her death all of the tract "to the heirs of the body of M.": *Held,* under the rule in *Shelley's case* M. took the part devised to her in fee simple at the death of the testator, and likewise the other with life

estate to J., in fee simple after his death; and a conveyance of the fee of the tract devised, joined in by J. and M., conveyed the fee-simple title to their grantee.

APPEAL by defendants from *Shaw, J.*, at July Term, 1915, of CLEVELAND.

Action to recover the purchase price of a certain tract of land of 110½ acres on the west side of a tract of 221 acres, which the plaintiffs, Mary McSwain and J. J. Price, agreed to sell to the defendant, S. S. Royster. The defendant admits that he agreed to buy the land, and he refuses to pay the purchase money and to accept the deed tendered to him upon the ground that the plaintiffs are not the owners of the land in fee.

Prior to 7 June, 1908, Judith Price was the owner in fee of said land, and on that date she died leaving a last will and testament as follows:

In the name of Almighty God and in His presence, I, Judith Price, of the county of Cleveland and State of North Carolina, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make and publish this my will and testament, and as follows:

(1) That my executor hereinafter named shall provide for my body a decent burial, such as my friends may wish, and pay all funeral expenses and debts that may be against me, out of the first moneys that come into his hands.

(2) I give and devise that my beloved husband, J. J. Price, shall have 110½ acres of land on the west end of the tract of land heired by me, during his natural life, and also my husband aforesaid shall have control of the other one-half during his life, so as not to deprive the heir of living on same as hereinafter mentioned.

(3) I give to my daughter, Mary McSwain, 110½ on the east end of tract during her natural life, and then to the heirs of her body.

(4) I give to my husband one-half of the personal property or money that may be due me of my father's estate.

(5) I give to my daughter, Mary McSwain, one-half of my personal property or money that may be due me of my father's estate.

(6) That at the death of my husband, J. J. Price, the above (364) named lands to go to my daughter, Mary McSwain, and at her death all the above named lands of both parties to go to the heirs of the body of said Mary McSwain.

(7) I, Judith Price, hereby appoint as my executor W. W. Washburn. This is my last will and desire to my beloved husband, J. J. Price, and daughter, Mary McSwain, and the heirs of her body, administrators, executors and assigns forever.

In witness whereof, I, the said Judith Price, do hereby set my hand and affix my seal. JUDITH PRICE.

Signed and sealed in the presence of these witnesses, this 20 January, 1905.

ELLA WASHBURN.
FAY WRIGHT.

In 1909 J. J. Price conveyed to Mary McSwain his interest in the eastern end of said tract in exchange for a deed from her conveying to him a life interest in the west end of said tract. Both J. J. Price and Mary McSwain join in the deed tendered to the defendant.

His Honor rendered judgment in favor of the plaintiffs, holding that the deed would pass a fee-simple title, and the defendant excepted and appealed.

C. B. McBrayer for plaintiff.
No counsel for defendant.

ALLEN, J. The question involved in this appeal has been settled by numerous decisions of this Court, and that is that under language like that used in items three and six of the will of Judith Price the first taker has an estate in fee under the rule in *Shelley's case.*

In *Leathers v. Gray,* 101 N. C., 162, the language was to P. "during his natural life, and after her death to the begotten heirs or heiresses of her body"; in *Tyson v. Sinclair,* 138 N. C., 24, the devise was to a grandson "during the term of his natural life, then to the lawful heirs of his body"; in *Pitchford v. Limer,* 139 N. C., 13, to P. "for life, and after his death to his heirs forever"; and in *Perry v. Hackney,* 142 N. C., 368, the testator devised to his granddaughter the use and benefit and profit of his land during his natural life, and to the lawful heirs of her body after her death, and in all these cases it was held that the first taker had an estate in fee.

In the last case the Court says: "Where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediatly to his heirs, in fee or in tail, always, in such case, 'he heirs' are words of limita-
(365) tion of the estate, and not words of purchase, and superadded words of limitation, not varying the course of descent, do not prevent the application of the rule. *Shelley's case,* 1 Coke, 104. The rule applies only where the same persons will take the same estate, whether they take by descent or purchase, in which case they are considered to take by descent. *Ward v. Jones,* 40 N. C., 400; *Howell v.*

Knight, 100 N. C., 257. They who take in remainder must take in the quality of heirs according to the course of descent established by law. The rule is one of law, and not merely one of construction for the purpose of ascertaining the intention, and when the words of the limitation bring the case within the rule it applies, regardless of the intent, or, if expressed differently, the intention is presumed to be in accordance with that which the law implies from the use of words having a fixed and definite meaning."

The 110½ acres on the west end of the 221-acre tract can be easily ascertained and identified under the rule laid down by *Pearson, C. J.,* in *Stewart v. Salmonds,* 74 N. C., 519, and approved in *Webb v. Cummings,* 127 N. C., 43.

There is

No error.

Cited: Keziah v. Medlin, 173, N. C. 238 (f); *White v. Goodwin,* 174 N. C. 726 (f).

ELLEN SETTEE v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 24 November, 1915.)

Court's Discretion—Verdict Set Aside—Separation of Jurors—Matters of Law—Appeal and Error.

The trial judge, in his reasonable discretion, may set aside a verdict of the jury and refuse to find the facts upon which he does so and rest his judgment therein as a matter of law; and, it appearing in this case that he permitted the jury to separate during the trial without the knowledge or consent of the appellee, and has set aside the verdict after their motion and argument, on this ground, but within his discretionary powers, his action in so doing is not reviewable on appeal, it being for his determination whether the separation of the jury in any sense was prejudicial to the rights of the moving party, the appellee.

APPEAL by defendant from *Lane, J.,* at March Term, 1915, of MECKLENBURG.

Civil action.

The plaintiff sued to recover damages for injuries alleged to have been caused by the negligence of defendant, the particular act of negligence being that defendant had carelessly left an iron frog in one of the streets of the city of Charlotte, and while plaintiff was walking along said street her foot was caught in the frog, throwing her to the ground

and greatly injuring her ankle and foot. The jury returned the following verdict:

(366) 1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

2. Was the release set out in the answer secured by undue advantage and fraud, as alleged in the replication of the plaintiff? No answer.

3. What damages is the plaintiff entitled to recover of the defendant? No answer.

Plaintiff moved for a new trial upon two grounds: (1) That the judge, without her consent, or that of her counsel, without their knowledge, and during the trial, after the jury had retired to make up their verdict, permitted the jurors to separate and go to their respective homes, returning the next morning to resume their deliberations. (2) Because of the refusal of the court to instruct the jury upon the first issue as requested by plaintiff.

It was admitted that the next morning plaintiff's counsel, about 10 o'clock, learned of the separation of the jury and made no objection thereto before the verdict was returned.

After argument of counsel upon the motion to set aside the verdict the court announced that the verdict would be set aside, and counsel for defendant then requested the court to find the facts and let the order setting aside the verdict be based on matters of law. The court refused to do so, and caused the following entry to be made upon the minutes: "Plaintiff moves to set aside the verdict, and the court, in the exercise of its discretion, allows the motion and orders that the verdict be set aside."

Defendant excepted and appealed.

J. W. Keerans for plaintiff.

Osborne, Cocke & Robinson for defendant.

WALKER, J., after stating the case: It is not required of us that we should consider the motion for a new trial so far as it was based upon errors in law, for the presiding judge elected to set it aside in the exercise of his discretion, as he clearly had the power and right to do. He was not bound to grant the request of the defendant that he confine his order for the new trial to matters of law, no more than he would be compelled to do so if he had, upon full hearing and investigation, found as a fact that the verdict had actually been procured by fraud or other act of corruption. If he thought that his action in allowing a separation of the jurors was, under the circumstances, calculated to prejudice the plaintiff, he not only had the right, but, in a moral sense at least, it was his duty to set it aside, and it follows that he might so use his discretion

as to make it subservient to his moral perceptions or to his idea of what was right and proper under the circumstances. Trials could not be safely conducted upon any other principle.

It has been said by this Court that if the circumstances are (367) such as merely to put suspicion on the verdict by showing, not that there was, but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge, to set aside the verdict if he thinks it proper to do so. *S. v. Tilghman,* 33 N. C., 553, 554. It has recently been held by us that when there is merely ground for suspicion, the judge may, in his discretion, set aside the verdict. *Lewis v. Fountain,* 168 N. C., 279. And it was further said in that case: "Such matters are in the discretion of the trial court, certainly in the absence of a palpable abuse of discretion."

The discretion of the judge to set aside a verdict is not an arbitrary one to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of presenting what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. *Jarrett v. Trunk Co.,* 142 N. C., 469. We said in that case, at page 470: "One of the most delicate and responsible duties of all those the judge must perform is the use of his discretion in passing upon the rights of litigants, when he has no fixed and certain rule for his guidance, but is left, as *Judge Gaston* once expressed it, 'to his own notions of fitness and expediency'; and while, perhaps, discretion should always be exercised sparingly, and surely not unnecessarily, yet the duty of using it is one the law requires of him, and which he should perform with firmness and without hesitation, in all cases where he deems it necessary to execute justice and maintain the right." But the precise case is put by *Justice Connor* in *Abernethy v. Yount,* 138 N. C., 344: "We do not question his Honor's power—if in the exercise of his sound discretion there had been on his part, or on the part of any other person connected with the case, any irregularity or inadvertence, or any other like reason, by which the defendant had suffered injustice—to set the verdict aside."

There was nothing arbitrary here, and not the slightest ground for suspecting even an abuse of discretion. His Honor, inspired, no doubt, by his profound sense of justice, and his earnest desire that each of the parties should have a perfectly fair and equal chance with his adversary before the law, set aside the verdict, as any fair-minded judge (368) would have done if he entertained a doubt as to whether the trial had been fair to the plaintiff by reason of the separation of the jurors. It was done for their comfort and convenience, and with a perfectly correct motive, but, nevertheless, it was for the judge afterwards to decide whether it was fraught with any danger to the plaintiff's rights, and his conclusion, while thus exercising his discretion, we will not review here. He is better able to decide the question than we are, because of his presence, and participation in the trial, where the situation must have appeared to him far more clearly than we can see it. We do not now recall a case where the exercise of discretion by a judge in such a matter was revised. The action of the judge will not do the defendant any serious harm. It may lose some time, but nothing more.

This view was well expressed by *Justice Bynum* in *Moore v. Edmiston,* 70 N. C., 481. "Our case is favorably distinguishable from the cases of *S. v. Miller,* 18 N. C., 500 and *S. v. Tilghman,* 33 N. C., 553, in that there new trials were refused, and the prisoners were executed, while here a new trial was granted, and the only inconvenience seen is the trivial one of a short postponement of the case. If the defendant has merits, he need not fear a second trial; if he has none, the new trial is granted in the interests of justice." It is unfortunate, perhaps, that even time should be lost, but trials are constantly exposed to such chances and untoward events, and for that reason, and that justice may not miscarry, this saving power is lodged with the judge to supervise them, in order to prevent any wrong being done, and his discretion, therefore, must be ample, if the purpose in confiding it to him is to be fully accomplished.

We see nothing in the case to take it out of the ordinary rule, that we will not review the exercise of the judge's discretion, and certainly not unless there has manifestly been a gross abuse of it, which does not appear by this record.

There was no error in the ruling of the court.

No error.

Cited: Settee v. Electric Railway, 171 N. C. 441 *S.c.; Rankin v. Oates,* 183 N. C. 519 (l); *Bailey v. Mineral Co.,* 183 N. C. 527 (f); *Wolf v. Goldstein,* 192 N. C. 819 (f); *Goodman v. Goodman,* 201 N. C. 811 (f); *Batson v. Laundry,* 202 N. C. 563 (d); *Acceptance Corp. v. Jones,* 203 N. C. 527 (l); *Bank v. Sanders,* 203 N. C. 848 (f).

JULIET M. COWLES, INDIVIDUALLY AND AS EXECUTRIX, v. PROVIDENT LIFE ASSURANCE SOCIETY OF NEW YORK ET AL.

(Filed 8 December, 1915.)

1. Issues—Insurance—Loan Note—Consideration.

The forms of issues submitted to the jury are of little consequence if the material facts at issue are clearly presented by them; and where the controversy is whether an insurance company had the right to deduct the amount of a loan note from the amount of its matured policy before payment, for failure of a consideration for the note, an issue presenting the question of whether the note, in the stated amount, was given without consideration is amply sufficient.

2. Insurance, Life—Loan Note—Limitation of Actions.

Where the insurer has accepted a loan note with the express provision that its amount shall be deducted from the policy of life insurance issued by it, at maturity thereof, and the policy has since matured, the running of the statute of limitations cannot affect the right of the insurer to retain the money due on the note.

3. Insurance—Loan Note—Consideration—Burden of Proof.

A loan note expressing upon its face "for value received," and given to an insurer of life, imports a consideration therefor and is *prima facie* evidence thereof, whether the note is negotiable or not; and where the note also states that its amount is to be deducted from the matured policy, its execution, and that of the policy and application therefor are admitted, the burden of proof is on the plaintiff, seeking to invalidate the note for want of consideration, to show the absence thereof.

4. Same—Exchange of Policies.

A note given by the insured for the difference between the amount of the premiums paid to the date of the issuance of a new for the old policy, upon the insured's and the beneficiary's request, the new policy, in its terms and provisions, being more valuable to the insured and the beneficiaries, is for a valuable consideration, and under the circumstances of this case the transaction is not invalid as being against public policy.

5. Same—Contracts—Courts.

A note given for the difference in past premiums on a policy of life insurance, which policy by agreement of the parties is contemporaneously taken up and replaced by a new one of greater advantages to the insured and the beneficiary, but bearing a larger premium, and specifying that the note shall be paid out of the proceeds of the new policy when it matures, is construed as a part of the policy contract, which the courts are not at liberty to change or vary, when not contravening public policy.

6. Insurance—Loan Notes—Possession—Presumption—Payment — Pleadings—Evidence.

The insured before his death gave the insurer a loan note to be paid out of his policy of life insurance at its maturity, and, alleging the want

of consideration, and not payment, the plaintiff in his action on the policy seeks to show payment of the note. The note was introduced in evidence by the plaintiff, but was in defendant's possession and procured on plaintiff's notice: *Held*, under this and other circumstances of the case, the plaintiff failed to show by a scintilla of evidence that the note had been paid.

7. Trials—Insurance—Loan Notes—Tender—Costs.

The defendant in this action on a policy of life insurance, having a right under a valid contract of insurance to pay off a loan note out of the proceeds of the matured policy, tendered a judgment to the plaintiff of the difference between this amount and the face value of the policy: *Held*, the defendant should be taxed with the cost theretofore accruing, and the plaintiff with the cost thereafter.

(369) APPEAL by plaintiff from *Shaw, J.*, at May Term, 1915, of IREDELL.

This action is brought to recover on an insurance policy, issued 28 April, 1903, by the first named defendant, and thereafter assumed by the other, and tried upon these issues:

(370) 1. Was the note executed by Col. H. C. Cowles to the Provident Savings Life Assurance Society, for $2,539.25, given without any consideration? Answer: No.

2. Is plaintiff's cause of action barred by the statute of limitations, as alleged? Answer: No.

3. Is defendants' cause of action on note referred to in the first issue above barred by the statute of limitations, as alleged? Answer: No.

It is admitted that the policy matured 21 September, 1912, during the life of the insured, and that under the endowment contract there was due five thousand dollars. The action was instituted 1 July, 1913, during the life of the insured by the plaintiff Juliet, his wife, as assignee and beneficiary, and after his death she became also party as administratrix.

The defendants claim the right to deduct from the sum due on the policy the amount due on a loan note, viz.:

COLLATERAL LOAN NOTE

$2,539.25/100. NEW YORK, 21 September, 1902.

For value received, I promise to pay to the Provident Savings Life Assurance Society of New York, or its order, twenty-five hundred and thirty-nine and 25/100 dollars with interest at the rate of five (5) per cent per annum, payable on 21 September in each year. In case interest hereon be not paid when due, it shall be added to the principal of this note; the collateral security of this note and interest being the absolute value of Policy No. 79030 of said society on the life of Henry

C. Cowles, which policy, and all amounts payable thereon, are hereby assigned, pledged and hypothecated to said society, and if at any time the amount due on this note, together with any additional loan made on this policy with accrued interest shall equal or exceed the then net reserve value on the policy, computed according to the laws of the State of New York, said society is hereby authorized to cancel said policy and terminate the insurance under it, thereby releasing itself from all liability.

The assured has the privilege of paying this loan at any time prior to the termination of the policy. Should the policy become payable while this note is outstanding, the amount of the note with any additional loans and all interests due thereon shall be deducted by said society from the amount due on this policy.

HENRY C. COWLES,
Assured.

The plaintiff excepted to the issues submitted and tendered the following:

1. What amount is plaintiff entitled to recover of defendant?

2. Is the defendant's alleged right of recoupment or set-off, arising out of the collateral loan note, set up in the answer, (371) barred by the statute of limitations?

At the conclusion of plaintiff's evidence, defendants offering none, plaintiff requested the court to instruct the jury: "That if the jury find the facts to be as testified to by the witnesses, and as shown by the documentary evidence, they will answer the first issue Yes."

The court refused and plaintiff excepted.

Upon the issues, as answered, the court deducted the sum due on the note 21 September, 1912, viz., $4,094.60, from the sum then due on the policy, $5,000, and rendered judgment for balance, $905.40, with interest thereon from 21 September, 1912.

The court further adjudged that, in consequence of tender of judgment made by defendants and refused by plaintiff, the plaintiff was liable for costs of action incurred after 16 December, 1913. Plaintiff excepted and from the judgment rendered appealed.

Tillett & Guthrie and L. C. Caldwell for plaintiff.

H. P. Grier, Z. V. Long and James H. Pou for defendant.

BROWN, J. The objection to the form of the issues cannot be sustained. The only question involved is the right of the defendants to deduct the sum due on the loan note 21 September, 1912, from the $5,000 admitted to be due on the policy on that the date of its maturity.

The plaintiff had opportunity, under the issues as submitted, to present any pertinent evidence. The form of the issues is of little consequence if the material facts at issue are clearly presented by them. *Paper Co. v. Chronicle Co.,* 115 N. C., 147; *Patton v. Garrett,* 116 N. C., 847.

There is nothing upon which to base a plea of the statute of limitations, for the policy matured 21 September, 1912, and, by the express words of the note, the defendants were authorized *on that date* to deduct from the money then due on the policy a sufficient sum to pay the note.

The court properly placed the burden of proof upon the first issue on the plaintiff. The execution of the policy, of the application therefor, and of the loan note were admitted and the papers themselves introduced in evidence by the plaintiff. The loan note appears upon its face to be made "for value received." This recital imports a consideration, and is *prima facie* evidence thereof, whether the note is negotiable or not, and the same is true of words of equivalent import. 8 Cyc., 225, That an unsealed note which recites to be for value received furnishes proof *prima facie* of a consideration to support it is the adjudication of this Court in *Stronach v. Bledsoe,* 85 N. C., 474. As the note itself bears evidence that it was made upon valuable consideration, the court properly refused the plaintiff's prayer and put the burden on plaintiff to show a want of consideration. *Stronach v. Bledsoe,* 85 N. C., at page 476; I Daniel Neg. Inst., sec. 161.

(372) But, apart from all this, the judge might well have instructed the jury that there is no evidence to rebut the *prima facie* case of consideration made out by the instrument itself. All the evidence in this record was introduced by the plaintiff and shows the transaction between the parties to be about as follows:

The insured, H. C. Cowles, held a policy, No. 79030, issued by defendant some time previous to 28 April, 1903, at which date he and his wife made written application to defendant to exchange it for a twenty-year endowment bond 910 policy with annual premiums of $376.05, and expressly asked that the new policy be dated 21 September, 1892, so as to fall due 21 September, 1912, if Cowles lived so long.

The great difference in value between the old policy and the new is well described in the evidence. The old policy was a term policy insuring the life of Cowles for one year at a time with the privilege of renewal for each succeeding year at a higher and constantly increasing rate of premium. It had neither cash surrender value, paid up nor extended insurance values; and must be carried until death to have any value whatsoever, and was limited in amount to five thousand dollars. It was in evidence that the premium upon this policy would have, before the death of Cowles, reached a very large sum, probably eight hundred dollars a year.

The new policy was almost the exact opposite of the first. Instead of having to be carried to death, it was so framed as to mature less than ten years from its issue, or twenty from its date, and be payable during the life of Cowles if he lived longer than the endowment period, which expired 21 September, 1912. Unlike the old policy, it had cash surrender, loan, paid up and extended insurance values, all of which are set out in the table on the third page of the policy. It had also in addition to the amount of five thousand dollars absolutely guaranteed, a term feature, by which additional protection was given to the beneficiary had the insured died before the maturity of the policy. Thus, while the policy was issued in 1903, it had immediately a loan value of twenty-four hundred and ninety dollars and a paid up endowment value of twenty-six hundred and thirty dollars; and a death benefit, had death occurred during that year, of seventy-two hundred and twenty-five dollars. These amounts all increased; and during the year ending 21 September, 1911, or the year before the maturity of the policy, it had a loan value of five thousand dollars, a death benefit value of ninety-six hundred and forty-five dollars, and a paid up endowment insurance value of forty-seven hundred and thirty-five dollars. The next year the policy matured; and during that year, or the year of maturity, these values had so increased that, had the assured died during the year ending 21 September, 1912, the beneficiary would have received five thousand dollars endowment, and, in addition thereto, five thousand dollars more under the term insurance feature. The witness (373) Conklin was asked: "Had Col. Cowles died the last year he was paying premiums, what would his beneficiary have received under the new policy?" To which he answered: "She would receive ten thousand dollars, less the indebtedness."

Besides this, the new policy was predated more than ten years by agreement between the assured and beneficiary on one side and the society on the other; and by reason of such predating had immediate and larger values than it would have acquired without such predating; and it required only ten payments, one of which was made cash at the time, to mature the policy, instead of twenty had it been dated on the day it was issued, instead of being dated ten years prior thereto.

By the predating of the policy the assured got the benefit of a premium based upon his age in 1892, fifty years, instead of sixty years, his age in 1903; and the rate of premium paid by him was consequently much less than if his policy had been dated in 1903. Assured had all the benefit in values, loan, rate of premium, protection of legal reserve, etc., under the policy delivered him in 1903 that he would have had under a similar policy actually delivered to him 21 September, 1912. The new policy required only ten premiums—less in case of earlier death—

while the old one required payments during life. These appear to be substantial and material values, inherent to the new policy, which did not appertain to the old one, and amply supported the consideration for the note.

The great difference in the value of the two policies is apparent even to one not versed in the intricacies of life insurance. Dating the new policy back ten years made the fixed annual premium much less, and made it mature as to its endowment ten years earlier. The ten years back premiums had to be paid. For making the exchange of policies, Cowles contracted to pay $2,915.30, as shown by the following extract from application:

It is also understood and agreed that the assured pay to the Provident Savings Life Assurance Society of New York at or before the delivery of the policy hereby applied for, the sum of twenty-nine hundred and fifteen and 20/100 dollars, and in consideration thereof at the time of the delivery of the policy hereby applied for the Provident Savings Life Assurance Society of New York agrees to loan to the assured the sum of twenty-five hundred and thirty nine and 25/100 dollars ($2,539.-25/100) upon the security of said policy, and the said amount shall be a lien upon said policy when issued until the same shall be paid.

And it is also understood and agreed that the assured is hereby authorized to sign a collateral note to secure the repayment of said sum in the form in use by said society.

(374) It is further understood and agreed that all statements and warranties upon which the validity of said policy No. 79030 is conditioned are hereby renewed as to the date when made, and are hereby made a part of the contract under the policy hereby applied for, and of the consideration therefor.

Dated at Statesville, 28 April, 1903.

HENRY C. COWLES.
JULIET M. COWLES.

It is quite certain that the defendant would not swap policies with Cowles without charging him "boot." There was entirely too great a difference in the intrinsic value of the two policies, especially as the new one was dated back ten years and the premium fixed at a date when Cowles was ten years younger than he was at date of his application. The difference which Cowles agreed to pay, as shown by the written application, was $2,915.30. He executed this note for $2,539.25 at five per cent interest and paid balance in cash. It is perfectly patent that the consideration for the note was the exchange of policies. The cash payment which Cowles made of $376.05 was evidently for the premium

on the new policy for the ensuing year, which must be paid in cash in advance.

The note represented the difference between the premiums which the assured paid upon his old policy from 21 September, 1892. The amount of the note differs very slightly from the reserve required to be kept on this policy had it been issued in 1892, and very slightly from the loan value which such a policy, issued in 1892, would have had in 1903, according to the testimony of the witness Hubbard.

Plaintiff contended that the note was illegal because its effect, if legal, would be to reduce the amount of insurance available to the beneficiary to a sum less than the guaranteed amount of five thousand dollars. When the policy was delivered the amount payable at death was seventy-two hundred and twenty-five dollars, less twenty-five hundred thirty-nine and 25/100 dollars, the amount of the note, slightly below the five thousand dollars guaranteed.

This objection seems to be without force; and no authority was cited to sustain it, and we have found none. In principle we do not think the objection well founded, for to give it effect would be to very seriously hamper the borrowing privilege of the assured, which privilege sometimes may prove very valuable. The unavoidable effect of any loan against a policy is to reduce the amount payable under the policy; and, if the loan be made during the early life of the policy, it will ordinarily reduce the value of the policy below the guaranteed amount. If a considerable loan be made, as was the case in this instance, contemporaneously with the issue of the policy, almost of necessity the amount available after the payment of the loan will be less than the face of the policy.

The unprofitableness of this contract to the insured, urged by (375) counsel so earnestly, is a matter which should not influence us.
Had the insured died before the maturity of the policy, it would have turned out very differently for the beneficiary. But, however it may finally result, insurance is a contract; and, when a contract is admitted, the Court can no more change its terms than it can the terms of any other contract. The Court cannot, after the maturity of the policy by death or by any other cause, look back to the beginning and say that this policy, having been proven unprofitable to the assured, should be changed so as to make it profitable. Any such construction of a policy would destroy the business of insurance and make it impossible. The courts, instead of interpreting, would be making a contract after all mutuality between the parties to the contract had ceased.

We do not find in our own reports a case analogous to the one at bar, and none were cited to us in the argument. We find in the courts of sister States cases similar and some almost analogous. In *McIntyre v.*

Ins. Co., 82 Georgia, 478, *Chief Justice Bleckley* discusses learnedly a suit brought on a fifteen-year endowment policy, in which the insured objected to a deduction from the endowment fund of interest which had accrued on notes which he had given for one-half of the premium. He contended that the interest on these notes, at least, should be deducted entirely from the profits of the company, it being to some extent a mutual company; and that in no event should the interest on these premium notes be deducted from the principal of the endowment, because that would be to reduce the amount of the guaranteed endowment. The Court held to the contrary; and the principal of the notes given for part of the premiums, together with interest thereon until the end of the endowment period, were deducted from the face of the endowment, leaving so small an amount that plaintiff was dissatisfied and brought suit.

Whether a policy loan was without consideration, was against public policy, or was a discrimination is discussed in *Life Ins. Co. v. Woods,* 11 Indiana App., 338. The Court said:

"We see no valid reason why an insurance company and an applicant for life insurance may not enter into a binding agreement to the effect that the company will undertake to loan the insured a sum of money, as well as to insure his life, and that the money loaned is to be deducted from the proceeds of the policy at the time of the maturity thereof. Such a contract is not in violation of the principle of indemnity upon which insurance is generally based, for the money may be needed for the payment of premiums and other purposes to enable the insured to secure the full benefit of such insurance. Hence, if the contract in suit had provided in terms for a loan of money, and the repayment of the same out of the proceeds of the insurance, that having such a provision would be binding upon all parties, although the policy be written
(376) for the sole benefit of the wife. It is true that in ordinary life insurance, where the wife of the insured is the beneficiary, the title of the policy vests in her immediately upon execution and delivery thereof, and no arrangement between the company and the insured affecting the interest of the wife in the insurance money, which is not provided for by the terms of the policy itself, will be binding upon her."

In *Life Assurance Society v. Dunkin,* 1st Tenn. Chancery App., page 562, the Court said that "where the husband gives a loan certificate to the insurance company as part of the first premium paid by him, his beneficiary, his wife, will not, after his death, be allowed to repudiate the note and claim the face of the policy."

Hay v. Ins. Co., 101 N. E., 651, from Indiana, is a case very similar to the one at bar. In that case the insurance policy was predated seven years, a loan agreement executed, note given and an agreement that the indebtedness was to be a lien on the policy. The Court held that the loan

agreement was binding on the beneficiary, even though executed without her knowledge or consent.

It is a general principle of the law of contracts that two or more instruments executed contemporaneously, by the same parties in reference to the same subject-matter, constitute one contract. Therefore, the policy and note must be taken as one transaction and construed together. According to their terms the beneficiary would receive stipulated sums, varying in amount, if insured died before the end of the endowment or accumulation period. If he outlived that period she would only receive $5,000. Whether the insured died before or after that period a sum sufficient to pay the note was to be retained by defendant out of the sum due on the policy.

It was suggested on argument that Cowles may have paid the $2,915.-30 in cash. If so, then why did he give the note, the execution of which is admitted? There is no evidence that he paid anything more than $376.05 in cash, and that was for the premium on the new policy for ensuing year. Deduct that from $2,915.30 and we have left the sum of $2,539.25, the principal of the note. There is no plea of payment set up against the note, and not a scintilla of evidence that any part of it has ever been paid.

It was admitted that the collateral loan note and agreement were in the possession of the defendants at the time of trial, and there was no denial of the rightfulness of their possession. There was no claim that plaintiff or her husband had ever had possession of the note or application after the execution of the same, more than ten years before the death of insured. The note or loan agreement and application were both offered on the trial and put in evidence by the plaintiff; but, before offering them, plaintiff requested the defendants to furnish them, which was done.

Upon the consideration of all the evidence we find nothing that (377) warrants the conclusion that this transaction is illegal, oppressive or immoral. Doubtless had the insured died prior to the end of the endowment period a very different result would have followed, and no such charge would have been made.

The view we have taken of this case renders it unnecessary to consider the fifty assignments of error in the record except the one relating to the tender and costs.

Plaintiff objected that the court awarded costs against her from the time of the tender of judgment made by defendants on 16 December, 1913. It is not denied that the tender was made. It is recited as a fact in the judgment and is set out in the defendants' answer. The only objection made to the tender is that it was not enough. Plaintiff contended that tender should have been made upon a basis of computation

of interest on the policy, and likewise on the note to 16 December, 1913, instead of to 21 September, 1912. Nor is there any objection to the form of the tender. It is treated as being regular.

The policy matured 21 September, 1912. The note provided as follows: "Should the policy become payable while this note is outstanding, the amount of the note, with any additional loans and all interest thereon, shall be deducted by said society from the amount due on this policy."

The note was outstanding when the policy fell due. Defendants admitted their liability on the policy for the full amount, subject to a deduction of the amount due on this note. The date of settlement was 21 September, 1912, when the policy matured. We have upheld that contention. The defendants, therefore, were indebted to plaintiff on said date in the sum of nine hundred five and 40/100 dollars, The tender of judgment was not for nine hundred five and 40/100 dollars, payable 16 December, 1913, but the tender was for nine hundred five and 40/100 dollars, together with interest thereon at the rate of six per cent per annum from the *21st day of September, 1912,* when it should have been paid, and for the costs of the action, incurred up to the date the tender was made, 16 December, 1913.

The defendants might have gone further and paid the money into court and stopped interest. They did not do that, however; and we hold that the tender was good, and that plaintiff cannot recover any costs, except such costs as had not been incurred on 16 December, 1913, the date of the tender. Certain costs not then payable were determinable before that time and were costs matured as of that date, such as rendition and enter of judgment, filing papers, etc. These costs must be paid by the defendants, notwithstanding its tender; but the other costs thereafter accruing, such as jury trial, taking of depositions, etc.,
(378) which would have been avoided *in toto* had defendant's offer been accepted, must be paid by plaintiff.

Upon a review of the record, we find

No error.

ISABELLA FISHER, ADMINISTRATRIX, ET AL. v. OLIVIA MANDA FISHER ET AL.

(Filed 8 December, 1915.)

1. Trusts and Trustees—Wills—Investments—Securities Directed—Courts.

Construing a devise to the wife of the testator's estate until she should die or remarry, with remainder to his children upon the happening of

either event, and directing, among other things, that the property not applied or necessary to be spent for his children should be invested in Government securities, paying each child his part upon arrival at 21 years of age, it is *Held*, the clause of the will as to investments seems to refer to any surplus which might accumulate in case the widow should die or remarry, over the current needs of the family; and where the estate has become involved and, in a proper suit, a trustee has been appointed to manage it, the court may sanction a departure from the investment directed when such becomes proper for the preservation of the estate.

2. Trusts and Trustees—Commissions Allowed.

It appearing in this case that the trustee in the management of an estate exceeding $100,000 was required to give the principal part of his time to his duties, furnishing office force, stationery, etc., at his own expense; that the estate increased under his management, and its income was greatly enhanced; that he had built six business stores, etc., it is held that an allowance of five per cent to him on the amount of the estate and the accruing income, made by the court and approved by the life tenant and one of the remaindermen authorized under the will to have a voice in the management, is not unreasonable, and will not be disturbed on appeal.

3. Trusts and Trustees—Courts—Investments Allowed—Excess—Rule of Prudent Man.

The trustee of a large estate was authorized by the court to spend $50,000 in a modern building in a city, and therein expended in excess thereof a sum exceeding $9,000. In this suit it is charged that the building was an unwise investment and unauthorized as to the excess over the sum allowed by the court, for which the trustee should personably be charged. It is not charged that the estate did not receive the benefit of this extra expenditure or that it was an undesirable outlay. It appeared also that it had been reported to the court from time to time as the building progressed, and approved: *Held*, the trustee is not always held to an assured judgment in the management of a trust fund or making an investment, but to the exercise of the sound discretion of the prudent man, and the exception was properly overruled.

4. Trusts and Trustees—Investments—Personal Interests.

The trustee of a large estate invested $8,000 of the trust fund in a bank of which he was president, and it is charged that the return upon this investment was inadequate. This investment was made under authority of the court and approved by the administratrix with the will annexed and the owner of the life estate, to which the principal, with some interest, has been returned: *Held*, while a trustee must account either for profits or legal rate of interest for trust funds invested in his own individual enterprise, this principle will not apply to the circumstances of this case.

5. Same—Insurance Premiums.

The trustee was allowed commissions on insurance premiums taken out by him for the benefit of the estate, to which exception was taken that he was interested in the agencies issuing them. There was nothing

to show that the insurance carried was not in the exercise of good business judgment, or that the premium rate was not that ordinarily charged for the class of risk assumed: *Held*, the exception was properly overruled.

6. Parties—Minors—Representation—Trusts and Trustees—Courts—Investments.

Where investments made by a trustee under orders of court are objected to because of minor interests alleged not to have been properly represented by guardian before the court, the investments objected to will not be set aside as a matter of right unless it is made to appear that they had been improper in themselves or worked injury to the estate, or that the orders of the court were improvidently made.

(379) APPEAL by plaintiff, administratrix and defendants from *Lyon, J.*, at March Term, 1915, of GUILFORD.

Cicil action, heard on petition filed in the cause alleging unauthorized and improper expenditures by C. A. Bray, trustee, and report of referee concerning same.

On perusal of the record, it appears that B. J. Fisher died in 1913, leaving him surviving a widow, Isabella, who qualified as administratrix, with the will annexed, and several minor children, defendants, and a last will and testament in which the bulk of his property, in America, was devised and bequeathed to his wife for life, remainder to his children on the death or marriage of his widow, and directing, among other things, that the property not applied or necessary to be spent, etc., for his children, should be invested in Government securities, etc.

An investigation having disclosed that the estate of B. J. Fisher was greatly embarrassed and encumbered with debt, liens, etc., it was considered necessary that, in order to preserve said estate and save something for the devisees under the will, the same should be placed in the control of competent business management, and in 1904 the present suit was instituted by Isabella Fisher, administratrix, against the infant children, a guardian *ad litem* duly appointed, and decree therein was made, appointing Mr. A. L. Brooks, of Greensboro, commissioner and receiver of the estate, who immediately qualified and entered on the duties of his office. Having faithfully served in this capacity for two years and more and accomplished the purpose for which he was primarily appointed, to wit, relieving the estate from debt and con-
(380) serving a substantial property for the widow and children of the testator, Mr. Brooks made a full report of his acts, etc., as receiver, to June Term, 1906, and, at his own request and with the sanction and approval of the court, was allowed to resign from his office, and Mr. C. A. Bray, the present trustee, was, by decree of court, and at the instance of the administratrix, appointed trustee for the further

management of the estate, then amounting to something over $100,000, about one-half of which was real estate, principally situated in the city of Greensboro.

The said trustee entered on his official duties and continued to act as trustee in the cause and in the control and management of the property, making reports from time to time until 1914, when the present petition was filed asking for an account and alleging various improper and unauthorized expenditures in the management of the property. At March Term, 1914, the questions presented were referred by order of court to Mr. T. C. Hoyle, who heard evidence and made a full and careful report of the acts of the trustee to September Term, 1914, approving his management and recommending that the balance due him for fees, etc., be paid as charged.

Exceptions having been filed by defendants, the matter was heard, as stated, at Spring Term, 1915, before *C. C. Lyon, J.*, and the court, overruling all of the exceptions, entered judgment that the report be confirmed, and defendants, having duly excepted, appealed, and the administratrix also joins in said appeal.

A. Wayland Cooke, Peacock & Dalton and C. M. Stedman for trustee,
W. P. Bynum for Mrs. Isabella Fisher.
G. S. Bradshaw, R. C. Strudwick for defendant.

HOKE, J., after stating the case: We have given the record very careful examination and find no reason for disturbing his Honor's judgment. Most of the expenditures objected to were made by order of court, first had, or were approved by the court after they were made, and many of them approved also by the administratrix and life tenant, entitled under the will to the income of the property, and some of the more important also by Olivia Maude Fisher, a defendant, one of the children of the testator, after she became of age, and when, by the terms of the will, "she was to have a voice in the management of her father's estate." It was suggested, by way of objection, that the investments have been made in utter disregard of the terms of the will directing "that all moneys not applied or necessary to be spent for my children shall be invested in United States securities, and when all arrive at 21 the fund accumulated to be divided, etc."

The will provides that the widow shall have the annual income till she dies or marries again and directs that, in case she does die or marry again while the children are under 21, the executor shall (381) manage and invest the estate, using the same in support of those under 21 and paying their share to such as have arrived at that age. The clause in the will as to investments seems to refer to any surplus

which might accumulate in case the widow should die or remarry. She has, as yet, done neither, and, in any event, there is, thus far, no case of surplus presented over and above the current needs of the family. Apart from this, the courts may at times sanction a departure from a direction of this character when such a course becomes necessary for the proper preservation of the estate. *Trust Co. v. Nicholson,* 162 N. C., 257; *Church v. Ange,* 161 N. C., 314; *Jones v. Haversham,* 107 U. S., 183; *Weld v. Weld,* 23 Rhode Island, 311; *Johns v. Johns,* 172 Ill., 472.

It was objected further that the charge of five per cent allowed the present trustee is unreasonable and unjustified, but we do not concur in this view. On this there is evidence tending to show, and the referee finds, that he has been in the charge and control of an estate exceeding $100,000 in amount, since 1906; that, since his appointment, he has given the principal part of his time to its management, and under his supervision it has increased in value and the income has been greatly enhanced; that he has, during that time, built five business stores in front of the City Hall in Greensboro; another large building known as the Fisher building on the corner of Elm and Market streets; that he has made loans, collected rents; that he has furnished his own bookkeeper, stenographer, office and stationery without extra charge to the estate, and, further, that at or prior to the time he entered on his duties there was an agreement between him and the administratrix and life tenant that his fees as trustee should be 5 per cent on the amount of the estate and the accruing income, this being the amount allowed, and that this agreement was approved by order of the court, and also by Olivia Maude Fisher, after she became of age, and when, as stated by the terms of the will, she was to have a voice in the management. Under such circumstances, the allowance made is fully justified, and, in our opinion, should not be disturbed even if it were now open to appellants to make their objections.

It was insisted, also, for defendants that the trustee, having been directed to invest $50,000 in a modern business building, actually expended thereon $59,997.79, and that he should be charged with the amount in excess of the preliminary order, and, further, that the building in question was an unwise investment; that it is the wrong kind of building for the character of the lot, and has, thus far, yielded inadequate returns. It is not contended or alleged that the amount as claimed by the trustee was not actually expended on this building, or that the estate has not received the benefit of it, or even that the additional expense was an undesirable outlay. It further appeared that the expenditures had
(382) been reported from time to time to the court as the building progressed, and the same were approved.

While the utmost degree of good faith is exacted of a trustee, he is not always held to an assured judgment in the management of a trust fund or in making an investment; the exercise of the sound discretion that a prudent man would show in the management of his own affairs is usually the approved standard in such cases. *Patton v. Farmer,* 87 N. C., 337; *S. ex rel Cummings v. Mebane,* 63 N. C., 315; 39 Cyc., pp. 291-292. On the facts as presented in the record the exception has been properly overruled.

Again, exception is made that $8,000 of the trust fund was invested in an incorporated bank of which the trustee was president, and that this principal has been returned with inadequate interest. The rule undoubtedly is that a trustee is not allowed, of his own will, to invest a trust fund in his own individual enterprise, and if he does so he must account either for profits realized or the legal rate of interest, at the election of the claimant. But it appears that this investment was made under a direct order of court, and further, that it was made with the knowledge and approval of Isabella Fisher, administratrix and owner of the annual income under the will, and that the principal, with some interest, has been returned to the estate. We think this exception, too, was properly overruled.

It was further contended that the trustee had, at different times, insured the properties through agencies in which he had a pecuniary interest; but there is nothing to show that the insurance carried was other than good business management required or that the rates were other than the ordinary rates for risks of like kind, and we see no reason for disallowing fees paid on the policies.

It is argued for appellants that the orders made in the cause do not conclude defendant appellants, inasmuch as they, or some of them, are minors, and they were made when there was no guardian *ad litem* representing them of record. It is not at all clear, on perusal of the record, that the infant defendants were ever without guardian *ad litem,* formally appointed, of record. So far as we can discover, it only appears inferentially in the order of *Judge Long,* at June Term, 1909, appointing Hon. N. L. Eure as guardian *ad litem,* and in which order it is recited that the former guardian had resigned. Whether that occurred at that or some preceding term does not appear, but, in any event, and in case there had been a resignation, unless it were shown that the investments objected to were improper in themselves or worked in some way injury to the estate, or that the orders of the court in the premises had been improvidently made, they would not be set aside as a matter of course. On the contrary, in the absence of some such suggestion and proof tending to establish it, these orders, even if irregularly made, should be confirmed by the court *nunc pro tunc.* There is (383)

no claim or suggestion that the former receiver, Mr. A. L. Brooks, did not fill the full measure of his duty, and, on careful consideration, we find nothing in the record to indicate that the present trustee has not properly accounted.

The judgment of the court below is, therefore,

Affirmed.

Cited: Steel Co. v. Hardware Co., 175 N. C. 454 (3d); *Besseliew v. Brown*, 177 N. C., 67 (3d); *Thompson v. Humphrey*, 179 N. C., 46; *S.c.; Ex Parte Wilds*, 182 N. C. 708 (1g); *Bank v. Alexander*, 188 N. C. 671 (1g); *Shields v. Harris*, 190 N. C. 528 (1g); *Young v. Hood, Comr. of Banks*, 209 N. C. 805 (3g, 4g); *Heyer v. Bulluck*, 210 N. C. 330 (1g).

M. C. HORTON v. SOUTHERN RAILWAY COMPANY AND WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 24 November, 1915.)

1. **Carriers of Goods—Damages—Penalties—Consignee Named—Consignee Aggrieved—Husband and Wife—Principal and Agent—Undisclosed Principal.**

   Where the consignee of a shipment of goods by a common carrier is not the owner thereof, but is acting as his undisclosed agent, the actual owner is the "consignee aggrieved" under the provisions of Revisal, sec. 2634, and may recover the penalty in an action against the carrier for failure to pay for damages to the shipment within the time and under the conditions specified in the statute. And this construction applies when the wife is the real owner and the husband is named as the consignee in the bill of lading.

2. **Carriers of Goods—Damages—Penalties—Consignee Aggrieved—Undisclosed Principal—Estoppel.**

   Where the undisclosed real owner as consignee in a shipment of goods by a railroad company remains silent and permits the consignee named in the bill of lading to recover the penalty prescribed by Revisal, sec. 2634, for failure to pay damages thereto, he is estopped to proceed against the carrier for the same recovery.

APPEAL by defendants from *Lyon, J.*, at March Term, 1915, of GUILFORD.

Civil action. The plaintiff sued for a penalty under Revisal, sec. 2634, for failing to adjust and pay a claim for loss or damage to property, household furniture, while in the possession of defendants, as carriers, within 60 days after filing of claim by plaintiff, it being an intra-

state shipment. The goods were shipped from Wadesboro, N. C., via the railways of defendants to Greensboro, N. C., and the bill of lading showed Ed. Little to be the consignor and G. R. Horton, husband of plaintiff, the consignee; but the goods belonged to plaintiff and her husband was acting as her agent, and, while he was the nominal, she was the real consignee. The goods arrived at Greensboro in a damaged condition and defendants promised to repair and deliver them to Mrs. Horton, but they failed to repair them, and afterwards sold them at Birmingham, Ala. The claim for the loss of the goods was (384) then filed with defendants in the name of Mrs. Horton. The court submitted two issues to the jury and they were answered as follows:

1. Are defendants indebted to plaintiff; if so, in what amount? Answer: $20.85.

2. Are defendants indebted to plaintiff in the sum of $50 for the penalty, as alleged in the complaint? Answer: Yes.

Judgment on the verdict, and appeal by defendants.

John A. Barringer for plaintiff.

Wilson & Ferguson, Watson, Buxton & Watson for defendants.

WALKER, J., after stating the case: Counsel admitted before us that the amount allowed by the jury for damage to the goods, that is, $20.85, had been paid by defendants, and they contested only plaintiff's right to the penalty under Revisal, sec. 2634, which provides that "It may be recovered, by any consignee aggrieved," in any court of competent jurisdiction.

If the goods had been shipped by Ed. Little to G. R. Horton, and the latter was acting for himself in the transaction, it might present the serious question as to whether he was not the consignee aggrieved, although the goods were owned by another and even by his wife. But in this shipment G. R. Horton was not acting for himself, but for his wife, she being the real party in interest, as owner of the goods. An agent may be a consignee, as well as a principal, for then he acts for the latter. The right to recover the penalty is incidental to the right to recover for the damage to or loss of the goods. A difficulty which we have encountered in the case is that the principal was not disclosed. But we think that is not so material in this case as might be supposed at first sight. It is the general rule that where a person, without knowing it, deals with one who is, in fact, acting as agent for another, the first person may elect, upon a disclosure of the principal, to hold either him or the agent responsible on the resulting contract, but cannot hold both, because he is put to his election as between them; and such election

may appear by any words or acts on his part tending to show a definite purpose or an unequivocal and final determination to depend solely upon the liability of the agent and to abandon the right to proceed against the principal, or conversely. 31 Cyc., 1578.

Referring to this principle, it has been said: "As a corollary to the well-recognized principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, the rule is elementary that an undisclosed principal may appear and hold the other party to the contract made with the agent. However, a person has a right to determine with whom he will contract, and (385) he cannot have another person thrust upon him against his expressed will. An undisclosed principal may claim the benefit of a contract of sale of his property by his agent, and may maintain an action thereon, and enforce any remedies which might have been pursued by the agent himself. Where an agent contracts in his own name for the transportation of goods without diclosing the name of his principal, the principal has a right of action against the carrier for failure to comply with the contract or for loss of or injury to the property." 31 Cyc., 1598, 1599, 1600, and cases in the notes. We need not endorse all of this, as we are of the opinion that the statute, Revisal, sec. 2634, intended to give an action to the principal in such a case for the goods, and also for the penalty as an incident thereof. The only doubt in regard to the matter that has been raised in our minds is, whether under this view the carrier is in any danger of being sujected to a double liability—one in an action by the agent who represented himself as principal and one by the actual principal—but we have concluded that this doubt is more fanciful than real. If the agent should sue and recover before the principal is disclosed, the principal would be bound by his act for having concealed his real character, and thereby having practiced a deceit upon the carrier, or if the agent acted of his own volition and without authority, then, having given him the opportunity to commit the wrong, the real principal or consignee should be equally estopped to proceed against the carrier for the same recovery.

As illustrative of this general principle, and analogous to it, we find it stated in 31 Cyc., at page 1607: "Where the principal has fraudulently or negligently intrusted property to an agent with all the indicia of authority or ownership, a third person purchasing from such agent in entire good faith will be protected from any claims of the principal, although the agent may have been given possession of the property for a special purpose and without authority to dispose of same. The general rule is that the principal may recover for injuries to his property or interests in the hands of his agent committed by a third person, whether by fraud or deceit, negligence or trespass, in the same manner

and to the same extent as though such agency did not exist, and as if he had himself dealt with such third person."

Returning to a consideration of the first proposition, in regard to the rights of the consignee, as against the carrier who has dealt with the former's agent without knowing his real character, the rule has been thus stated: "In an action for tort, brought against a railway company to recover damages for failure to safely transport live stock, plaintiff can show that the delivery was made to the carrier by him through an agent, although such agent made the shipment in his own name, without disclosing the fact that he was acting in behalf of plaintiff." 31 Cyc., 1607; *R. R. v. James,* 117 Ga., 832; *St. Nav. Co. v. Bank,* 6 (386) How. (U. S.), 344.

The statute (Rev., sec. 2634), as amended (Gregory's Supplement, sec. 2634), provides that the penalty shall go to the "consignee aggrieved," or to the consignor, if he is the owner of the goods. It is evident from this language that the Legislature intended to give the penalty to the party actually, or, as we may well express it, pecuniarily aggrieved, the one who sustains the loss, as being the owner of the goods or as having a beneficial interest therein, and not to the nominal consignee, when the latter was acting merely as agent for or in behalf of the real consignee or the party in interest. This accords with *Summers v. R. R.,* 138 N. C., 295; *Grocery Co. v. R. R.,* 136 N. C., 396, and also *Stone v. R. R,* 144 N. C., 220. If it does not mean this it would be difficult to say what it does mean, for otherwise every consignee could sue whether he had any interest in the goods or not, or any right to recover for a loss of or damage to them.

It may further be said that the statute (Rev., sec. 2634) contemplates that the party who is entitled to recover the damages, or to file and sue upon the claim, is, generally speaking, the party entitled to the penalty, for it requires that the "consignee" shall first establish his claim before he shall have the penalty, though he may sue for both in the same action. The cause of action for loss of or damage to the goods belongs to the real owner of them; and she has recovered in this case, without exception or appeal by defendant.

What we have decided does not conflict with the principle, in the law of agency, which we applied in *Helms v. Tel. Co.,* 143 N. C., 386, and the cases therein cited.

There is no error in the ruling and judgment of the court.

No error.

Cited: Grocery Co. v. R. R., 170 N. C., 247 (d); *Grocery Co. v. R. R.,* 170 N. C. 249 (j); *Lawshe v. R. R.,* 191 N. C. 475 (g); *Walston v. Whitley & Co.,* 226 N. C. 540 (g).

N. B. MILLS ET AL. v. J. M. DEATON ET AL.

(Filed 8 December, 1915.)

1. Public Officers—Sheriffs—Salaries and Fees—Legislative Control.

One who accepts a public office does so, with well defined exceptions as to certain constitutional offices, under the authority of the Legislature to change the emoluments he is to receive for the performance of his duties, at any time, and, while the office of sheriff is a constitutional one, the regulation of his fees is within the control of the Legislature, and the same may be reduced during the term of the incumbent, or he may therein be compensated by a salary instead of on a fee basis.

2. Same—"Back Taxes"—Interpretation of Statutes.

Where the Legislature has enacted that, after a certain date, a sheriff of a county shall be compensated with a salary in lieu of all commissions, and not, as theretofore, by fees, specifically providing that all fees, commissions, etc., on taxes collected, etc., "now belonging to or appertaining to, or hereafter by law belonging or appertaining to the sheriff by virtue of his office, shall faithfully be collected by him and turned over to the sheriff of the county," and back taxes are collected by the sheriff after the date whereon he was to be compensated by a fixed salary, it is *held*, that it was the intent and meaning of the statute that the salary should be for the full performance by the sheriff of his duties as such, and that he is required to pay all commissions for the collection of the back taxes to the county treasurer for the benefit of the county. This interpretation is emphasized by another section of the act construed, which indicates that the county commissioners were to have control over the collection of back taxes.

(387) APPEAL by plaintiff from *Lane, J.*, at October Term, 1915, of IREDELL.

This is a controversy without action submitted upon a case agreed. From the judgment rendered the plaintiffs appealed.

L. C. Caldwell and W. D. Turner for the plaintiffs.

R. B. McLaughlin and Dorman Thompson for the defendants.

BROWN, J. The plaintiffs are the commissioners of Iredell County and instituted this proceeding against the sheriff and his bondsmen for the purpose of determining the right of the sheriff to commissions for collecting taxes of 1914 after the first Monday in December of that year. The sum involved is $635.71, being commissions upon the sum of $12,714.26 collected after the first Monday in December, 1914, upon the tax lists of that year, which went into the sheriff's hands 1 October, 1914.

From the facts as agreed upon in this case it will be found: That J. M. Deaton was elected sheriff of Iredell County for the term beginning on the first Monday in December, 1912, and ending on the first Monday in December, 1914, and was reëlected sheriff of Iredell County for the term beginning on the first Monday in December, 1914; that as sheriff for the term beginning on the first Monday in December, 1912, the tax books for the year 1914 were placed with him as sheriff for collection on 1 October, 1914; that the Legislature, at its session in the year 1913, passed what is called a "'salary law" for Iredell County, placing the officers of said county on a salary, said act being chapter 519, Public-Local Laws 1913, and went into effect the first Monday in December, 1914; that the said J. M. Deaton retained the commissions on all taxes of the year 1914 collected by him after the first Monday in December, 1914, and during the remainder of said month, claiming that said commissions were due him as the retiring sheriff of Iredell County, and that the right to receive said commissions was in no way affected by the said "salary law."

The right of the General Assembly to change the method of compensation provided by law for a sheriff cannot be denied. The Legislature may, within reasonable limits, diminish the emoluments of (388) an office by the transfer of a portion of its duties to another office, or by reducing the salary or the fees, for the incumbent takes the office, subject to the power of the Legislature to make such changes as the public good may require. There are offices created by the Constitution which are placed beyond the control of the General Assembly, so that body can neither abolish the office nor reduce its compensation. *Mial v. Ellington,* 134 N. C., 131; *Bunting v. Gales,* 77 N. C., 283.

While the office of sheriff is a constitutional one, yet the regulation of its fees is within the control of the Legislature, and the same may be reduced during the term of the incumbent. *Comrs. v. Steadman,* 141 N. C., 448.

This case turns, therefore, upon the construction of the act of the General Assembly. It is apparent that, so far as the county of Iredell is concerned, the Legislature intended to abolish the fee system and substitute the salary law in lieu thereof for all county officers. It is manifest that the act requires the sheriff to collect the taxes of the county for the salary provided.

It also specifically provides "that all fees, commissions of five per cent on taxes collected, and all other commissions, profits and emoluments of all kinds now belonging or appertaining to, or hereafter by law belonging to or appertaining to the sheriff by virtue of his office, shall be faithfully collected by him and turned over to the treasurer of said county."

This explicit language leaves no room for construction. When the sheriff received the tax list 1 October, 1914, he was required by law to collect them upon a commission basis, and when that was changed to a salary the sheriff was likewise compelled to collect the taxes for the salary fixed. It does not matter that the present sheriff was elected or whether some one else had been elected in his place. The office of sheriff is one and indivisible, and the salary fixed for it under this statute is intended to cover all the duties except some minor matters provided for in section 1, which it is unnecessary to notice.

Section 4 of the statute provides that on the first Monday of December of each year all taxes levied for the preceding year yet remaining unpaid shall be turned over to the board of commissioners of Iredell County, and it further provides that they may add ten per cent against the taxpayer for failure to pay, and that the commissioners may appoint tax collectors to collect upon a commission fixed by the statute. This would indicate that the Legislature intended to give the county commissioners full control over what is called "back taxes," so as to provide for their more thorough collection.

In construing this statute we have adopted that sense which harmonizes best with the context, and which is consonant with the apparent policy and purposes of the Legislature. It was not the purpose (389) of the General Assembly to either increase or diminish specifically the emoluments of the sheriff's office. Its purpose was to abolish the fee and commission system entirely, and to provide a salary instead. It is difficult to conceive that the General Assembly intended that the sheriff should receive his salary commencing the first Monday in December, and, at the same time, continue to collect the taxes of 1914 and receive the emoluments provided by law before any salary was fixed. The sheriff, of course, has a right to his commissions upon all taxes collected for the year 1914 up to the first Monday of December of that year, and those commissions should be allowed him. After that he must continue to collect the taxes for 1914 as a part of the duties of his office, and as compensation for which a salary of $3,000 per annum is given "in lieu of *all other compensation whatever.*"

The judgment of the Superior Court is reversed and the cause remanded, with instructions to enter judgment for the plaintiff upon the case agreed.

Reversed.

Cited: Comrs. v. Bain, 173 N. C. 383 (d); *Comrs. v. Bain,* 173 N. C. 383 (j); *Comrs. v. Bain,* 173 N. C. 386 (j); *Thompson v. Comrs.,* 181 N. C. 266 (f); *Borders v. Cline,* 212 N. C. 476 (g).

J. A. AND C. E. BENNETT v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 8 December, 1915.)

1. Municipal Corporations—Discretionary Powers—Grading Streets—Railroads—Constitutional Law—Damages.

The rule excluding liability of a municipality to an abutting property owner for damages caused to his property by the grading of a street, done within the exercise of its discretionary powers, has no application where the work is done by a railroad company to facilitate its own business, for, though authorized by the city, the railroad company, in so acting, appropriates the property of the private owner and is liable to him to the extent that the value of the property has been diminished thereby, as well as for damages caused by its negligent and unskillful construction.

2. Same—Delegated Powers.

The right conferred upon a municipality to grade its streets without liability to abutting owners, within the proper exercise of its discretionary power, is for the public benefit, and cannot be transferred to a railroad company to do so for the furtherance of its own business.

3. Municipal Corporations—Grading Streets—Railroads—Measure of Damages—Issues.

It appearing in this case that a railroad company was appropriating private property to its own use in grading a street of a city for its own purposes, it is held that one issue submitted as to the damages was sufficient, and that permanent damages were recoverable by the abutting owners.

4. Evidence—Damages—Railroads—Grading Streets—Test of Opinion—Other Lots—Comparative Values.

In an action to recover damages to plaintiff's lot caused by the defendant grading a street upon which it abutted, a witness testified as to the value of plaintiff's lot, and it is held that the trial court committed no error in permitting him to testify the price he realized from the sale of his own lot as a test of the value of his opinion, there being some evidence of the similarity of the two lots, and of their condition, surroundings and value.

APPEAL by plaintiff from *Devin, J.*, at February Term, 1915, of (390) FORSYTH.

Civil action. This action was brought by the plaintiffs against the defendant and the city of Winston-Salem to recover damages for injury to their lot in said city, caused by the construction of a bridge or a viaduct and the approaches thereto, along Bank Street in said city, and between Liberty and Elm streets. It appears in the case that the defendant railroad company had laid a part of its track across Bank Street at grade, and, desiring to raise the grade of the street, and for that

purpose to build the bridge in question and construct the approaches thereto, it obtained permission from the city to do so, upon giving a bond to indemnify it against the damages. The railroad company then proceeded with the work, constructed the bridge, and raised the level of the street in such a way that ingress and egress to the plaintiff's lot was so obstructed as to greatly impair the value of the property. This was the allegation of the plaintiffs, and there was proof to sustain it, though it was denied by the defendant, which alleged that the work was done by the permission of the city and under its authority, and was also carefully performed according to a correct plan. The case was submitted to the jury upon the following issue:

Has the plaintiffs' property been damaged by the erection of the bridge along Bank Street, as alleged, and if so, in what amount? A. Yes; $2,250.

Judgment was rendered upon the verdict and the plaintiffs appealed, and reserved several exceptions to the rulings and judgment of the court.

Louis M. Swink for plaintiffs.

Watson, Buxton & Watson for defendant.

WALKER, J., after stating the case: It is apparent from the entire record in this case that the railroad company in constructing the bridge and its approaches was acting in its own behalf and for its own use and benefit, although it had obtained the permission of the city to do the work, and the same was done with its consent, but the work was not done by the city in the exercise of its governmental function, through the defendant, so as to protect the latter from liability except for
(391) negligence. It is well settled with us, and it is very generally held in other jurisdictions, that, unless otherwise provided by the Constitution or statute, the owner of property abutting on a street cannot recover for any damage to his property caused by a change in the grade of the street under proper municipal authority, where there is no negligence in the method or manner of doing the work. *Meares v. Wilmington,* 31 N. C., 73; *Wolf v. Pearson,* 114 N. C., 621; *Jones v. Henderson,* 147 N. C., 120; *Dorsey v. Henderson,* 148 N. C., 423; *Harper v. Lenoir,* 152 N. C., 723; *Stratford v. Greensboro,* 124 N. C., 127; *Jeffress v. Greenville,* 154 N. C., 500; *Hoyle v. Hickory,* 164 N. C., 82; *Hoyle v. Hickory,* 167 N. C., 621; McQuillin Mun. Corp., sec. 1975; 2 Dillon Mun. Corp., sec. 1040.

In *Hoyle v. Hickory,* 167 N. C., 620, this Court said: "It was decided in the former appeal that while plaintiffs could not recover for any detriment to their property which was the result merely of the proper grading of the street, which had been done in the due exercise of the dis-

cretionary power of the city to make needed improvements, it being *damnum absque injuria,* yet they could recover for any damage done thereto which was caused by a negligent grading of the street, following the principle as adopted in numerous decisions of this Court," citing many authorities.

This principle, we stated in the same case, has been recognized and enforced since the days of *Chief Justice Kenyon* and *Justice Buller. Mfrs. v. Meredith,* 4 Durnf. & East, 794, 796; *Sutton v. Clark,* 6 Taunt., 28; *Boulton v. Crowther,* 2 Barn. & Cres., 703. The doctrine is almost universally accepted by the State courts of this country. Cooley Const. Lim., 542, and notes. It was affirmed in *Transportation Co. v. Chicago,* 99 U. S., 635; *Smith v. Washington,* 20 How., 135, and *Meade v. Portland,* 200 U. S., 148.

As stated by the Court in the case last cited, it may be thus summarized: The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it did not protect the agents for improving highways which the State is compelled to employ. This principle of the law is usually made to rest upon the theory that any and all changes of this character in the streets of the town are supposed to have been contemplated, and, therefore, provided for in advance of the improvement and at the time of the original dedication of the street, and any abutting owner acquires and improves his property with full notice that such changes may be made from time to time. (392) Nichols Power of Em. Dom., secs. 81, 82, and 83; Lewis Em. Dom. (3 Ed.). sec. 134.

Nichols Power of Em. Dom., secs. 81, 82, and 83; Lewis Em. Dom. ered in grade so that it may be made safer or more convenient for traveling, the owner in not entitled to compensation. . . . The true reason for the rule is that when a highway is laid out the estimate taken includes the right to grade and construct *then,* or at any future time, in such a manner as the public authorities may deem conducive to safe and convenient traveling." And Lewis Em. Dom., *supra,* says: "When a street or highway is laid out compensation is given once for all, not only for the land taken, but for damages which may, at any time, be occasioned by adapting the surface of the street to the public needs."

This power to further grade and improve the streets of the town is a continuing one, and may be exercised in the legal discretion of the municipal government whenever the public may require it, as will ap-

pear from the above cited authorities, and also 1 Elliott Streets and Roads (3 Ed.), sec. 551. This discretion, although it may be a legal one, cannot be interfered with by the courts, except in case of manifest and gross abuse, or when it would be arbitrary and oppressive. *Brodnax v. Groom,* 64 N. C., 244; *Small v. Edenton,* 146 N. C., 527; *Luther v. Comrs.,* 164 N. C., 241, and other cases above cited. This power of the municipal corporation may, of course, be exercised by it through its own agents, who are commissioned or appointed to do the work which may be required, in order to make the improvement in the street. And when the work is done carefully, either by the corporation itself or by it when acting through its agents, the abutting owner has no legal right to redress, and any damage to his property or loss to him by reason of the improvement is considered by the law as *damnum absque injuria*—a loss without injury, the last word being used in the sense of an actionable wrong.

These principles have been very recently discussed by us in *Wood v. Land Co.,* 165 N. C., 367, where the authorities are collected. But the defendant in this case, the railroad company, can take no advantage of them upon the facts as they appear in this record. The city of Winston-Salem was not acting in its corporate capacity, and in the exercise of its municipal authority in raising the grade of Bank Street, solely for the public's use and convenience. On the contrary, the defendant was acting for itself and in furtherance of its own interests, and the mere fact that it had obtained the permission of the city to do the work does not vary the case, or take it out of the principle, so well settled, that private property should not be taken except for a public use, and then only upon just compensation. We presume the railroad company had the right to condemn the plaintiffs' property under its charter,
(393) and for the sake of argument we will assume this to be true, it being a public-service corporation; but if it has, in a legal sense, taken or appropriated the plaintiffs' property, it is liable to them to the extent that the value of the property has been diminished thereby, and if it has done the work unskillfully and negligently it would be liable to the plaintiffs also for any damage resulting therefrom. The city could not transfer to an individual, or to the *quasi*-public corporation for its own service and profit, this superior and sovereign right which is allowed to be used only for the public benefit. *Brown v. Electric Co.,* 138 N. C., 533; *Stratford v. Greensboro, supra.* The Legislature has no power, itself, to authorize corporations to take or use private property without compensation, and, of course, could not confer such a power upon the city. *Telegraph Co. v. McKenzie,* 74 Md., 36; *Walters v. R. R.,* 120 Md., 644; *Egerer v. R. R.,* 14 L. R. A., 381, and notes; *Muhlker v. R. R.,* 197 U. S., 49; *Vanderlip v. Grand Rapids,* 16 Am. St. Rep., 607, and notes;

White v. R. R., 113 N. C., 611; *Guano Co. v. Lumber Co.*, 168 N. C., 337 (84 S. E. Rep., 346); *Hester v. Traction Co.*, 138 N. C., 293.

The principle is well expressed in *Reining v. R. R.*, 128 N. Y., 168, where it is said: "We think it cannot, under the guise of exercising this power, appropriate a part of the street to the exclusive, or, practically, to the exclusive use of the railroad company, so as to cut off abutting owners from the use of any part of the street, without making compensation for the injury sustained." In this particular case, as is shown in the record, the object of making this improvement was to subserve the railroad use, so that it might better control its track and appurtenances, and facilitate the movement of its trains over it. The street, therefore, was subjected to a new burden in favor of this defendant, and this may be done in the exercise of the power of eminent domain, which belongs not only to the sovereign, but may be imparted to a public-service corporation by legislative enactment, provided adequate provision is made for the compensation of any private owner of property which will be damaged by the exercise of the power. It would be useless to pursue this subject any further, as this power has been so fully considered heretofore by the Court, and its scope and extent clearly defined. We will call special attention, though, to *Brown v. Electric Co.*, *Stratford v. Greensboro*, and *Moore v. Power Co.*, all cited *supra*, where a full discussion of the matter will be found, as well as in several of the other cases cited.

It will be observed that, in this case, there was but one issue submitted to the jury, and that related only to the question of damages and the amount which plaintiffs were entitled to recover. There was no issue involving the question as to the authority of the railroad company to do this work and be immune from liability for damages, unless it was done negligently; but even if such an issue had been submitted, it is so very clear that it possessed no such right as to practically elim- (394) inate that question from the case, and, upon the issue as to damages, the charge of the court was entirely free from error. The plaintiffs were entitled to recover for the diminution in value of property which was caused by the defendant's wrongful act, or by the appropriation of their property to its use, and in respect to works of this kind, which are of a lasting nature, the plaintiffs were entitled to recover permanent damages. *Lloyd v. Venable*, 168 N. C., 531; *Waste Co. v. R. R.*, 167 N. C., 340, and *R. R. v. Mfg. Co.*, 169 N. C., 160.

There is a question of evidence in the case, but we think his Honor ruled correctly in regard to it. The plaintiffs did not attempt to show substantively by the cross-examination of the witness what was the value of their lot as compared with his, but the question was asked, as to what he had realized from the sale of his property, for the purpose

of testing the value of his opinion, which had been before elicited by the defendant as to the value of the plaintiffs' lot, which he had estimated at a very low figure, there being, in our opinion, some evidence as to the similarity of the two lots, and their condition, surroundings and value, and at least enough to permit a cross-examination of the witness upon the subject. We do not think that the ruling of the court violated the principle as stated in *Warren v. Makely,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361, and *Board of Education v. Makeley,* 139 N. C., 31. The other exceptions are sufficiently covered by our discussion of those which we deem the important and controlling ones in the case.

Before closing this opinion we will call attention to the case of *Waste Co. v. R. R., supra,* as containing a very full discussion of the leading questions in this case, as applied to a state of facts very similar to those which are presented in this record.

After a careful analysis of the case, and a thorough consideration of the points presented by the learned counsel for the defendant, we are convinced that there has been no error committed during the trial.

No error.

Cited: Mason v. Durham, 175 N. C. 641 (1g); *Powell v. R. R.,* 178 N. C. 246, 247, (1f, 2f); *Stamey v. Burnsville,* 189 N. C. 43 (1b):

R. F. BURRIS AND WIFE, ALICE BURRIS, v. JOHN A. BUSH.

(Filed 8 December, 1915.)

Slander—Pleas—Justification—Evidence—Statutes.

Where there is no plea of justification or of mitigating circumstances, in an action for slander, evidence of the truth of the charge is incompetent. Revisal, sec. 502.

APPEAL by defendant from *Adams, J.,* at February Term, 1915, of CALDWELL.

(395) Action to recover damages for slander, in which the defendant denies speaking the words alleged in the complaint, but does not allege any facts nor rely on any plea in justification or mitigation. The defendant offered evidence tending to prove the truth of the words. This was excluded by the court and the defendant excepted. There was a verdict and judgment in favor of the plaintiff and the defendant appealed.

W. C. Newland for plaintiff.
No counsel for defendant.

ALLEN, J. The statute (Rev., sec. 502) permits a defendant in actions for libel or slander to allege "both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of the damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstances," but, in the absence of a plea in justification or mitigation, evidence of the truth of the charge is incompetent. *Upchurch v. Robertson,* 127 N. C., 128; *Dickerson v. Dial,* 159, N. C., 541.

It follows that there is no error in excluding the evidence offered by the defendant.

No error.

Cited: Elmore v. R. R., 189 N. C. 673 (f); *Pentuff v. Park,* 194 N. C. 158 (f); *Bryant v. Reedy,* 214 N. C. 753 (f).

BLALOCK HARDWARE COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 24 November, 1915.)

1. Carriers of Goods—Overcharges—Evidence—Rates for Different Routing—Trials—Nonsuit.

The burden is upon the plaintiff to show that a freight rate charged and collected by the carrier on an interstate shipment was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the State statutory penalty; and where the shipment has been routed over one line of connecting carriers and the tariff filed by the carrier over another route is shown, it affords no evidence as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit should be granted.

2. Interstate Commerce—Carriers of Goods—Overcharges—Penalty Statutes—Federal Control.

Under the Interstate Commerce act, as amended, Congress, in the exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and our statute (Rev., secs. 2643, 2644), imposing a penalty upon the carriers for collecting excessive rates for such shipments and refusing to repay them, is inoperative.

3. Interstate Commerce—Federal Interpretation—State Courts.

The interpretation placed upon the Interstate Commerce act and the legal consequence of its enactment, by the Supreme Court of the United States, is controlling in the State courts.

(396) APPEAL by defendant from *Rountree, J.*, at March Term, 1915, of ANSON.

Civil action to recover an alleged overcharge upon an interstate shipment, with the penalty for failure to refund said overcharge within sixty days as required by Revisal, secs. 2643-2644.

In May, 1912, there was shipped to plaintiff from Detroit, Mich., a carload of freight, and upon arrival plaintiff paid charges thereon amounting to $161.34. Plaintiff claimed that the charge should have been only $153.38, and, therefore, he had been over charged $7.96. Demand for the return of this alleged overcharge not being complied with, this action was instituted to recover the same, together with the penalty allowed by the statute for failure to refund the overcharge within the specified time.

Upon the trial below defendant moved to dismiss the action for want of jurisdiction, in that plaintiff's cause of action, if any, arose under the Federal act to regulate commerce, and only the Federal courts or the Interstate Commerce Commission had jurisdiction of claims arising under said act. This motion being denied, defendant then moved, for the same reason, to remove the case to the Federal court, but this motion was also denied. Defendant offered no evidence, but moved for judgment of nonsuit upon plaintiff's testimony. This motion being denied, defendant requested the court to charge the jury that no penalty could be collected for failure to refund an overcharge upon an interstate shipment. The court declined to so charge. There was a verdict for plaintiff for the overcharge, with penalty of $100, and, the court having denied defendant's motion to set aside the verdict and for a new trial, judgment was entered upon the verdict, whereupon defendant excepted and appealed.

Gulledge, Boggan & Kelly and H. H. McLendon for plaintiff.

McIntyre, Lawrence & Proctor and Walter E. Brock for defendant.

WALKER, J., after stating the case: It is contended by the defendant that plaintiff has failed to offer any evidence of the alleged overcharge. The burden was upon the plaintiff to show that the amount charged by defendant was in excess of the rate specified in the published tariffs. (Rev., sec. 2642.) The only evidence offered by plaintiff as to the published rate was a certificate of the secretary of the Interstate Commerce

Commission, showing that the rate on automobiles from Detroit, Mich., to Richmond, Va., was a certain amount, and that the rate from Richmond to Wadesboro was a certain amount. But the claim papers filed by plaintiff with defendant, and offered in evidence by plaintiff, show that the shipment in question did not move by way of Richmond, Va., but over an entirely different route. The bill of lading showed that the shipment moved over the line of the C. C. & O. R. Company and was by that carrier delivered to defendant's line at Bostic, N. C. (397) The freight bills showed that defendant received this shipment at Bostic, N. C. (the junction point), and transported it to Wadesboro. It therefore follows that the certificate showing what the published rate was, if the shipment had moved by way of Richmond, Va., is no evidence whatever as to what is the correct or published rate when the shipment moved by way of Bostic, N. C. The defendant was entitled to charge according to the rate allowed over the route by which the shipment was made, nothing else appearing. The charge over one route may not be the same as the charge over a different route, for this Court has held that the rate between two points in one direction is not necessarily the same as that between the same points when the shipment moves in an opposite direction, and, *a fortiori,* when it moves in a different direction or by a different route. There was no evidence that the rates were published as required by the Interstate Commerce act. This question was decided in *Peanut Co. v. R. R.,* 166 N. C., 62; *Scull v. R. R.,* 144 N. C., 180. This being all the evidence offered by plaintiff to show the published rates, and the rates shown, even if they had been properly published, not being applicable to shipments moving via Bostic, N. C., the plaintiff should have been nonsuited, as there was no proof of an overcharge.

As to the penalty. This Court has upheld Revisal, sec. 2644, against attack based upon the grounds that it denied to the carrier the equal protection of the law, due process of law, and because it conflicted with the commerce clause of the Federal Constitution, but defendant now contends that recent amendments of Congress have so completely taken possession of the field of commerce as to exclude the power of the State to legislate with respect to interstate shipments. The cases in which a State may exercise power over the general subject of commerce may be divided into three classes: first, those in which the power of the State is exclusive; second, those in which the State may act in the absence of Federal legislation; and, third, those in which, the subject being national in character, the action of Congress is exclusive and the State cannot interfere at all. *Harrill v. R. R.,* 144 N. C., 539; *Bridge Co. v. Kentucky,* 154 U. S., 204; *Telegraph Co. v. James,* 162 U. S., 650; *R. R. v. Reid,* 222 U. S., 424.

The Court held, in *R. R. v. Reid, supra,* passing upon the validity of our statute, Revisal, sec. 2631, in regard to the penalty for refusing to receive freight which has been duly tendered, that inhibitive legislation of Congress is not essential to exclude that of a State upon incidental matters relating to interstate commerce, with respect to which both had a concurrent power, it being sufficient to do so if the congressional legislation occupies the field of regulation, and they said that "there is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce act is aimed. It is true that (398) words directly inhibitive of the exercise of State authority are not employed, but the subject is taken possession of." It then concludes that the statute imposing the penalty, being an invasion of the field of interstate commerce, is invalid.

The same Court said, in *R. R. v. Washington,* 222 U. S., 370: "The right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, arises only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the State law could have been made applicable, it results that, as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation, that subject was at once removed from the sphere of the authority of the State." And in *R. R. v. Hardwick,* 226 U. S., 426: "The elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the State may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent, but only permissive power."

An examination of the Interstate Commerce act, as amended, will disclose that, upon the subject of rates, Congress has taken entire control, and especially as to excessive charges on them, or those not corresponding with the rates authorized, filed and published. It is not necessary that we should state its provisions more specifically. The following cases sustain our view in regard to the act and its legal effect upon the validity of the penalty imposed by Revisal, secs. 2643, 2644. *Express Co. v. Croninger,* 226 U. S., 491; *R. R. v. New York,* 233 U. S., 671; *R. R. v. Harris,* 234 U. S., 412; *R. R. v. Railroad Commission,* 236 U. S., 439; *R. R. v. Hooker,* 233 U. S., 97. But the recent case of *R. R. v. Furniture Co.,* 237 U. S., 597, is so decisive of the question that further

citation is rendered useless. The following syllabus of that case states very concisely, though fully, the points considered and the result of the decision.

1. A State law not contrived in aid of the policies of Congress, but to enforce a policy of the State differently conceived, cannot be said to be in aid of interstate commerce.

2. When Congress has taken the particular subject-matter in hand, coincidence of a State statute is as ineffective as opposition, and a State law on the same subject cannot be sustained as a help to the Federal statute because it goes farther than Congress has seen fit to go.

3. A State statute which is a burden on interstate commerce is (399) not saved by calling it an exercise of police power.

4. Section 2573, Code of 1912, of South Carolina, imposing a penalty on carriers for failure to settle or adjust claims within forty days, is an unconstitutional burden on interstate commerce, and is also in conflict with the provisions of the act to regulate commerce, as amended by the act of 29 June, 1906 (Carmack amendment).

5. *R. R. v. Mazursky,* 216 U. S., 122, distinguished, as that case was decided prior to the enactment of the Carmack amendment.

This Court said, in *Marble Co. v. R. R.* 147 N. C., 57: "If the section embraces any legislation which is not local in its nature and, although in aid of commerce, is a regulation thereof within the meaning of those terms as defined by the court having final and ultimate jurisdiction to decide such a question, the statute is void to the extent that it exceeds the proper limit of legislative power prescribed to the State by the Constitution of the United States as construed by that Court. When the purpose of the legislation is of such a kind as to require uniformity, then, in order to bring the transportation within the control of the State as a part of its domestic commerce, the subject transported must be, within the entire voyage, under the exclusive jurisdiction of the State." The decisions of the highest Federal Court determine conclusively for us the true construction and meaning of the Interstate Commerce act and the legal consequences flowing from its enactment, and we are bound to accept its construction without regard to our own views as to what it should be, not implying, though, that there is any such difference of opinion. This compels us to hold that the statute in question, so far as it imposes a penalty for failure to refund the amount of an overcharge for freight shipped in interstate commerce, cannot be enforced, being in conflict with the constitutional legislation of Congress upon the same subject. Other errors are assigned, but we need not consider them.

There was error in the refusal of the court to grant the nonsuit, for which we reverse the judgment.

Reversed.

CALDWELL LAND AND LUMBER COMPANY v. GRANVILLE CHESTER AND WIFE.

(Filed 8 December, 1915.)

Appeal and Error—Case Agreed—Time—Judgments in Term—Signature of Judge—Rendered Out of Term—Statutes.

It is not required that a judgment rendered in term be signed by the judge, and where the parties agree to an extension of time to serve case, countercase or exceptions on appeal from a judgment thus rendered, the time must be computed for serving appellant's case from the end of the term, and not from the time the judgment was actually thereafter signed under an agreement that the judge should do so. Instances where the judgment is rendered out of time have no application. Revisal, sec. 559.

(400) APPEAL by defendants from *Harding, J.*, at April Term, 1915, of AVERY.

S. J. Ervin, Mark Squires and W. C. Newland for plaintiff.
Lowe & Love for defendants.

CLARK, C. J. In this case, upon the verdict of the jury coming in, judgment was rendered at the April Term of Avery, which adjourned 30 April, 1915. By agreement 90 days was allowed appellants to serve case on appeal and plaintiff allowed 60 days thereafter to file exceptions or counter-case. The defendants served their case on appeal 8 September, 1915. The plaintiff contested that this was too late, and served their exceptions on 19 October, without, however, waiving their right to object that the service of the case on appeal was too late.

The judge properly held that the appellants' case was served too late and refused to settle the case on appeal. The appellants contend that they were in time because by consent the judgment was to be signed in vacation and was signed on 19 June, being less than 90 days before the service of the case on appeal.

The judgment was rendered on the verdict before the adjournment of the court, 30 April. It is not necessary that a judgment be signed when it is rendered in open court. *Bond v. Wool,* 113 N. C., 29, and cases there cited.

The appellants do not distinguish between the signing in vacation of a judgment rendered at term and the rendering of a judgment in vacation by consent, Revisal, 559. In the latter case there is no judgment to appeal from, and it is not known in whose favor it is until it is rendered; hence the time in which to appeal and to serve case on appeal is counted from the filing of such judgment in the clerk's office.

But when, as in this case, the judgment is rendered in term the party cast has notice and must give his notice of appeal and serve his case in the prescribed, or agreed, time from the adjournment of that term. The appellants were in court when the judgment was rendered and gave notice of appeal. By agreement they had 90 days in which to serve their case on appeal, and failed to do so.

The motion for a *certiorari* must be denied, and the motion of the appellees to docket and dismiss under Rule 17 is allowed.

Appeal dismissed.

(401)

TEANIE HOWELL ET AL. v. W. C. HURLEY ET AL.

(Filed 8 December, 1915.)

1. Grants—State's Lands—Copies — Seal of State — Presumptions — Evidence—Constitutional Law.

An abstract of a grant of State's land by the Secretary of State imports the regularity of its issuance and that the constitutional mandate of affixing the seal to the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it.

2. Grants—Entries—Seal of State—Presumptions—Interpretation of Statutes.

The Legislature has the power to change the rule of evidence when the party affected has been given ample time to protect his rights under the statute, and ch. 249, Laws 1915, declaring that certified copies of entries of grants of the State's lands may be received in evidence on trial involving title to the lands therein described, under the presumption that the Great Seal of the State was affixed to the original grant, in the absence of evidence to the contrary, is constitutional and valid.

APPEAL by defendants from *Lane, J.*, at September Term, 1915, of MONTGOMERY.

Action to recover land. The facts are fully stated in the former appeal.*

Since the former decision, and before the new trial was had, the General Assembly enacted the following statute, being ch. 249, Laws 1915:

*This case was decided at Fall Term, 1914, but by inadvertence, evidently due to the burning of the printing plant, does not appear among the reported cases. It will be found at the end of this volume.

Whereas, for a long period of time many grants for lands in this State were duly issued in manner provided by law, and records thereof were made and kept in the proper books for recording grants issued by the State, but in recording said grants the same were not copied in full upon said records; and,

Whereas, in many instances the Secretary of State appears to have recorded only memoranda or abstracts of grants so issued, showing the number and date of the grant, the name of the grantee and the description of the lands conveyed, with the name of the Governor and the Secretary of State, but without reciting the Great Seal of State or indicating the name on the record; and,

Whereas, in some instances the Secretary of State has also failed to indicate on the record the signature of the Governor and countersigning by the Secretary of State, and has failed to recite or indicate the Great Seal of State on the record; and,

(402) *Whereas,* some question has arisen as to whether or not certified copies of such grants so recorded are competent to be offered in evidence in the courts of this State for the purpose of showing title out of the State of North Carolina: now, therefore,

The General Assembly of North Carolina do enact:

SECTION 1. That for the purpose of showing title from the State of North Carolina to the grantee or grantees therein named, and for the lands therein described, duly certified copies of all such grants and of all such memoranda and abstracts of grants shall be competent to be offered in evidence in the courts of this State, or of the United States, or of any territory of the United States, and, in the absence of the production of the original grant, shall be conclusive evidence of a grant from the State to the grantee or grantees named, and for the lands described therein.

SEC. 2. That duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties or certified copies thereof shall likewise be competent to be offered in evidence for the purpose of showing title from the State of North Carolina to the grantee or grantees named, and for the lands therein described.

SEC. 3 That all such records of grants and of such memoranda and abstracts of grants in the office of the Secretary of State are hereby validated and made of the same effect as if the same had been copied in full upon the record of grants in said office.

SEC. 4. That this act shall be in force and effect from and after its ratification.

Ratified 9 March, 1915.

On the new trial a certified copy from the office of the Secretary of State of the paper referred to as the grant to Jacob Lassiter was admitted in evidence and the defendants excepted.

There was a verdict and judgment for the plaintiffs and the defendants appealed.

Brittain & Brittain and J. A. Spence for plaintiffs.
Jerome & Jerome for defendants.

ALLEN, J. Was the paper referred to as the grant to Jacob Lassiter properly admitted in evidence? This is the only question raised by the appeal, and it is conceded by the defendant that if it is answered in the affirmative the judgment of the Superior Court ought to be affirmed, and the plaintiffs admit that if it is answered in the negative a new trial should be ordered.

When the case was here on the former appeal the paper was treated in the argument as a grant and was so dealt with by the Court, and, there being no seal and no evidence of one, it was held in obedi- (403) ence to the plain mandate of the Constitution that it was not valid as a grant, but, upon a more careful inspection of the paper, and after comparison with records in the office of the Secretary of State, while it may be held in form a grant, under the rule of construction adopted in *Triplett v. Williams,* 149 N. C., 394, and frequently affirmed since then, it more nearly conforms to abstracts of grants, which are memoranda of grants made from the original grant by the Secretary of State and entered of record, containing the name of the grantee and the description of the land, than to grants themselves, and, if so, the presumption of the regularity of official conduct would prevail.

In other words, as the abstract could only be made legally, and recorded, if the Secretary of State had before him a grant issued under the Great Seal of the State, in the absence of evidence to the contrary, it would be presumed that the Great Seal was affixed.

We had occasion to consider this question in *Poplin v. Hatley, ante,* 163, and it was then held that a will of date 1862, which was recorded, but without any record of a probate, was presumed to have been properly probated from the fact that it was on record.

The Court said: "The paper is in its proper place on a record of the court, and it is there rightfully or wrongfully. Is the presumption that the officer who transcribed it did so legally, or that he did so without legal authority? The authorities seem to be practically uniform in favor of the presumption that the officer acted regularly and in accordance with law.

" 'The general presumption is that public officers perform their official duty and that their official acts are regular, and, where some preceding act or preëxisting fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or preëxisting fact.' 22 A. & E. Ency., 1267.

" 'It will be presumed that public officers have been duly elected, and that they have qualified; that their official acts are properly performed, and, in general, that everything in connection with the official act was legally done, whether prior to the act, as giving notice, serving process, or determining the existence of conditions prescribed as a prerequisite to legal action. 16 Cyc., 1076.

" 'It is a rule of very general applicataion that where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it the presumption of the due performance of the prior act.' *Knox County v. Bank,* 147 U. S., 91.

" 'The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with. This is the general rule in respect to official action, and (404) one who claims that any such prerequisite did not exist must affirmatively show the fact." *Nofire v. United States,* 164 U. S., 657.

"This principle has been applied in our State in *Clifton v. Wynne,* 80 N. C., 147; *Gregg v. Mallett,* 111 N. C., 76; *Morris v. House,* 125 N. C., 556; *Cochran v. Improvement Co.,* 127 N. C., 394, and in other cases.

"In *Gregg v. Mallett, supra,* the Court says: 'But by the general rules of evidence certain presumptions are continually made in favor of the regularity of proceedings and the validity of acts. It is presumed that every man in his private and official character does his duty until the contrary is proven; it will presume that all things are rightly done unless the circumstances of the case overturn this presumption. Thus it will presume that a man acting in a public office has been rightfully appointed, that entries found in public books have been made by the proper officer; and like instances abound of these presumptions.'

"*Nelson v. Whitfield,* 82 N. C., 50, is almost directly in point. In that case the records had been destroyed and the original will could not be found, and the parties claiming under the will had to rely upon proof of its contents by witnesses who had seen the will on the record, but they were not able to furnish any evidence that it had been probated or that a certificate of probate was recorded, and the Court, dealing with this question, says: 'At the date of the alleged execution of the will the

courts of pleas and quarter sessions had jurisdiction of the probate of wills and were directed to order them to be recorded in proper books kept for that purpose. They were to be recorded in these books after probate had. The fact, then, that the will of Benjamin Whitfield was found in a book kept by the clerk of the court of pleas and quarter sessions in accordance with the requirements of law is *prima facie* evidence of the probate of the will. *Omnia presumuntur rite acta esse.* There was evidence, then, to go to the jury of the existence of the will of Benjamin Whitfield and that it had been duly proved and recorded.' "

If, however, we treat the paper as a grant we are of opinion that the act of 1915 is valid and that it authorized the admission of the paper in evidence. The act does not purport to validate a grant issued without affixing the Great Seal of the State, but it in effect declares that certified copies from the office of the Secretary of State shall furnish evidence that the seal was affixed to the original grant in the absence of evidence to the contrary, and, so considered, it merely changes a rule of evidence, which is in the power of the General Assembly.

The author says, in Modern American Law, vol. 11, p. 334: "The right to a particular remedy is not a vested right. This is the general rule, and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule, every State has complete control over the remedies which it offers to suitors in the (405) courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains. Thus, the Legistature may change the provisions of the statute of limitations so as to affect the remedy on existing contracts, provided it leaves a reasonable time within which to enforce a right under the contract. It may change the rules of evidence; but not to such extent as to render incompetent any evidence of an existing contract"; and, again, it is said in 8 Cyc., 1915: "A law which establishes a rule of evidence respecting certain past transactions cannot be said to impair the obligation of contracts. Laws which change the rules of evidence relate to the remedy only."

In *Tabor v. Ward,* 83 N. C., 294, the Court treats this power of the General Assembly as settled and beyond controversy. *Ashe, J.,* speaking for the Court, says: "It is well settled by a long current of judicial decisions, State and Federal, that the Legislature of a State may at any time modify the remedy, even take away a common-law remedy altogether, without substituting any in its place, if another efficient remedy remains, without impairing the obligation of the contract. And whatever belongs to the remedy may be altered, provided the alteration does

not impair the obligation of the contract. Cooley Const. Lim., 350. Laws which change the rules of evidence relate to the remedy only. They are at all times subject to modification and control by the Legislature, and changes thus made may be made applicable to existing causes of action. *Howard v. Moot,* 64 N. Y., 262; Cooley, 353. They are incident to the remedy, and if the remedy may be abolished or modified, *a fortiori* may the rules of evidence be changed or abrogated."

A striking instance of the exercise of legislative power to change the rules of evidence and one seemingly in conflict with the classification of *ex post facto* laws, by *Mr. Justice Chase* in *Calder v. Bull,* 3 Dall., 386, is furnished by *Thompson v. Missouri,* 171 U. S., 380. The plaintiff in error, Thompson, was tried and convicted in the courts of Missouri upon the charge of murder by poisoning with strychnine, and, upon the trial, the State was permitted to introduce letters written by Thompson to his wife for the purpose of comparison with a prescription which it was alleged he had written. He appealed to the Supreme Court of Missouri and a new trial was ordered for error in admitting the letters. Pending the new trial the General Assembly of Missouri passed an act making the letters competent, and upon the new trial the letters were again introduced and Thompson was again convicted. He appealed to the Supreme Court of Missouri, where the judgment was affirmed, and then sued out a writ of error to the Supreme Court of the United
(406) States, and that Court sustained the judgment of the Supreme Court of Missouri.

We are therefore of opinion that whether the paper-writing is treated as an abstract or as a grant, it was properly admitted in evidence upon the last trial.

No error.

Cited: Herbert v. Development Co., 170 N. C. 625 (g); *Powell v. Dail,* 172 N. C., 265 (g).

M. W. WARREN v. W. H. DAIL, SR., AND M. V. DAIL.

(Filed 8 Decmeber, 1915.)

1. Married Women—Separate Realty — Constitutional Law — Deeds and Conveyances—Privy Examination—Contracts to Convey—Statutes.

Before the enactment of the Martin Act, being ch. 109, Laws 1911, our statutes defining the status of married women in reference to their capacity to make an executory contract, notably Revisal, secs. 952, 2107, 2094, 2112 and 2113, were upheld as valid with reference to the provisions of our Constitution, Art. X, sec. 6, that "the real 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 way entitled, shall be and remain the sole and separate estate and property of such female . . . and, with the written assent of her husband, conveyed by her as if she were unmarried"; but were not construed so as to permit a married woman, without the privy examination taken, to make executory contracts which would be a charge upon her separate real estate.

2. Same—Damages.

Chapter 109, Laws of 1911, known as the Martin Act, permitting a married woman to contract with reference to her separate property or estate as if she were a *feme sole*, is constitutional and valid, and by express terms excepts only from its provisions conveyances "of her realty unless made with the written assent of her husband as provided by sec. 6 of Art. X of the Constitution," and requires that her privy examination as to the execution of the same be taken as now required by law. The statute having expressly reserved "conveyances" of a married woman of her realty from its effect, the exception is not held to apply to her contracts to convey her realty, and where such examination has not been obtained in such contracts, and she refuses to perform them for that reason, equity cannot enforce specific performance, but damages may be awarded against her in an action at law for the breach of the contract, which, under our Code practice, are administered in one court.

3. Married Women—Contracts to Convey—Separate Realty—Deeds and Conveyances—Privy Examination—Equitable Owner.

The Martin Act being construed to permit a married woman to contract with regard to her separate property as if she were a *feme sole*, except as to her conveyances of her realty, in which case her privy examination, etc., is required, the equitable principle which regards the holder of an interest in lands as the real owner cannot defeat the legislative intent by making the reservation apply to her contracts to convey her realty also.

4. Same—Damages—Statutes.

The prohibition of the Martin Act that a married woman may not convey her separate real property except upon her privy examination being duly taken, does not prevent the application of the usual rule of contracts, that, upon their breach, damages are recoverable, so as to deny a recovery of damages where a married woman has contracted to convey land, without her privy examination taken, and fails in her performance thereof, specific performance being regarded as additional and supplementary to the rule for damages.

5. Same—Consent of Husband.

The rule that a married woman is liable in damages for failure to specifically perform her contract to convey her lands under the Martin Act may not be successfully defeated upon the ground that she may be unable to get the consent of her husband to the conveyance, in the absence of any bad faith.

6. Married Women—Separate Realty—Contracts to Convey—Impossible Performances—Damages—Equity Jurisdiction—Code Practice—Statutes.

The rule that where an executory contract incapable of specific performance was entered into by the complaining party with knowledge of the fact, damages for its breach were not recoverable, was addressed to a suit brought in equity where legal damages were not administered, and to the jurisdiction of the court therein, and has no application under our Code procedure where legal and equitable remedies are administered in the same court.

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

(407) APPEAL by plaintiff from *Connor, J.*, at October Term, 1915, of GREENE.

Civil action to recover for breach of contract to convey to plaintiff certain real estate, pursuant to a definite written contract to that effect signed by plaintiff and by defendants, W. H. Dail and his wife, M. V. Dail.

Defendants, admitting that *feme* defendant signed the contract, alleged and offered evidence tending to show that the privy examination of defendant, touching her execution of the contract, had not been taken. Second, that *feme* defendant had only a life estate in said land, she having conveyed same to her children, reserving a life estate therein, and this deed had been duly registered in said county for some time before the present contract was executed. Defendant offered evidence, further, to show that plaintiff, at the time of the contract, had actual notice of the deed executed by plaintiff to her children. This last position was controverted by plaintiff, who offered testimony in support of his position.

It was also alleged in the complaint and not denied in the answer that, at the time of the execution of the contract, *feme* defendant was a free trader. On issues submitted the jury rendered the following verdict:

1. Did defendants contract to convey the lands described in the complaint to the plaintiff, as alleged in the complaint? Answer: Yes.

2. If so, did the defendants fail and refuse to convey the said land pursuant to said contract, as alleged in the complaint? Answer:
(408) Yes.

3. If so, what sum, if any, is plaintiff entiled to recover of the defendants as damages for said breach of said contract Answer: $1,415, with interest from 1 January, 1913.

4. If so, what sum is plaintiff entitled to recover of the defendants as damages for injury to his business as a dealer in real estate? Answer: Nothing.

5. Did plaintiff, at time he entered into said contract with defendants, have constructive notice from the records of Greene County that defendants could not convey said land by good and indefeasible deed for the reason that they owned only a life estate in said land with remainder to their children? Answer: Yes.

6. Did plaintiff, at time he entered into said contract with defendants, have actual notice that defendants could not convey said land by good and indefeasible deed for the reason that they owned only a life estate in said land with remainder to their children? Answer: No.

Judgment on the verdict, and plaintiff excepted and appealed.

L. I. Moore, J. A. Albritton and J. P. Frizzelle for plaintiff.

F. M. Wooten for defendant.

HOKE, J. Our Constitution, Article X, sec. 6, contains provision as follows: "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, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

Soon after its adoption, the Legislature enacted statutes defining the status of married women in reference to property and their capacity to contract, the more important now appearing in Revisal, sec. 952, which requires that, in order to a valid conveyance, power of attorney or other instrument to affect her realty, this last to include contracts to convey deeds of trust, mortgages or other instruments, the same shall be executed by the husband and the wife and the privy examination of the wife shall be had; sec. 2107, regulating contracts between the husband and the wife and providing that, as to such contracts, in addition to the privy examination, that the officer taking such examination should certify that the contract was not unreasonable or injurious to the wife; sec. 2094, providing: "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary or personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before her marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed"; sec. 2112, directing how a (409) woman may become a free trader; and sec. 2113, provided that, when she has lawfully become such, she may "contract and deal as if she were a *feme sole.*"

In construing this section of our Constitution and statutes passed on the subject, it has been held that neither the constitutional provision nor the statutes referred to had the effect of enabling a married woman living with her husband to bind herself by contracts strictly *in personam*, but the constitutional provision declaring her property, real and personal, to be her sole and separate estate was intended and operated to enable her to *charge* her personal estate by contracts on the principle by which, under recognized equitable principles, she was formerly allowed to charge her separate estate in the hands of a trustee and her real estate also by contract in which her husband joined and the wife's privy examination taken. *Ball v. Paquin*, 140 N. C., 83; *Farthing v. Shields*, 106 N. C., 289; *Flaum v. Wallace*, 103 N. C., 296; *Pippen v. Wesson*, 74 N. C., 437. It was further held that the requirement as to certain classes of contracts that the husband should join in them and the privy examination of the wife taken was not in conflict with the constitutional provision that the wife's property could be conveyed with the written assent of the husband, but should be considered as establishing a form by which the husband's assent to the contract should be properly evidenced. *Southerland v. Hunter*, 93 N. C., 310; *Ferguson v. Kinsland*, 93 N. C., 337.

A comprehensive and searching analysis of the constitutional and statutory provisions, and the decisions construing the same, prior to *Ball v. Paquin*, prepared by Prof. Samuel F. Mordecai, dean of the Law Department of Trinity College, N. C., appears by permission and courtesy of Mr. Mordecai in Judge Pell's Revisal as a separate and additional annotation to sec. 2094, and may be consulted to advantage by persons desiring to inform themselves on this interesting subject.

Later, in *Council v. Pridgen*, 153 N. C., 443, it was held that the "power to contract and deal as if she were a *feme sole*," conferred upon a free trader by sec. 2113 of the Revisal, referred to the ordinary contracts made in some business in which a married woman might engage, and that it did not enable her to convey her real estate or make contracts to do so, etc., without privy examination, contrary to the express provisions of section 952. This being the law as it existed formerly, the Legislature of 1911, ch. 109, enacted the statute known as the Martin act, in terms as follows: "That sec. 2094 of the Revisal of 1905 be and the same is hereby repealed, and the following substituted therefor: 'That, subject to the provisions of section 2107 of the Revisal of 1905,

(410) every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband, as provided by sec. 6 of Art. X of the Constitution, and

her privy examination as to the execution of the same taken and certified, as now required by law.' "

This statute was construed in *Lipinsky v. Revell,* 167 N. C., 508, upholding the liability of a married woman on a contract of purchase of goods, etc., and in *Royal v. Southerland,* 168 N. C., 405, or an ordinary contract of suretyship, and, from the very definite and specific language of the statute and its evident purpose in reference to the law as it formerly existed, we think it should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by sec. 2107 must still be observed, and except in *conveyances* of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any and "all contracts so far as to affect her *real* and *personal* property, in the same manner and to the same effect as if she were unmarried." And, this being true, we concur in the ruling of the court below that, on breach of her contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. It is urged that the act, by correct construction, should be held to except "contracts to convey" as well as "conveyances," on the principle that equity not infrequently regards the holder of such an interest as the real owner. But, while this is a recognized principle, applicable in many instances when dealing with the interest under such a contract, equity, regarding that as done which a man is under a binding obligation to do, the position may not, in our opinion, be extended to enlarge and change the definite language of an act restricting an exception to "conveyances," and that, too, in modifying a law in which conveyances, powers of attorney and contracts to convey, etc., are expressly mentioned. In such case, if the Legislature had desired or intended to except executory contracts to convey, it would have added this to the word "conveyances," the only form of contract which the statute specifies as excepted.

Again, it is insisted that it is an unreasonable interpretation which holds a married woman liable to damages for breaking a contract when the statute itself provides that the contract may not be specifically enforced; but, to our minds, there is nothing unreasonable in this. The statute, which enables a married woman to bind herself by any contract to affect either her real or her personal estate, except that, in conveyances of the latter, the written assent of her husband and her privy examination are required, simply means that when she makes an executory contract of this character and her privy examination is not (411) taken she can only be held in damages, and that specific performance may not, as formerly, be enforced. The remedy by the award of damages is the ordinary means of adjustment for breaches of contract.

That by specific performance is properly regarded as additional and supplementary to the other. Pomeroy Contracts (2 Ed.), p. 11; Anson Contracts, pp. 384 and 385.

The requirement of privy examination in conveyances and contracts to convey realty having been established by the Legislature, it can modify the requirement or withdraw it altogether, and there is nothing unreasonable and, assuredly, nothing beyond its power in the enactment of a statute which says that in all contracts by married women to convey land, when same are wrongfully broken by them, they may be held responsible in damages, but they cannot be compelled to convey unless they have been privily examined according to forms of law.

Again, it is contended that it would be altogether unjust to mulct a married woman in damages when she might be perfectly willing to carry out her contract by a conveyance, and is prevented from doing so because her husband refuses to give his consent; but it is on more a hardship than any other case where one has, in good faith, contracted to convey land and afterwards finds out that he is unable to make title. The obligations of a contract, except in certain specified and very restricted instances, are imperative, and, when they are wrongfully broken, neither inability to perform nor ignorance of conditions may ordinarily avail as protection against an award of damages. *Steamboat Co. v. Transportation Co.,* 166 N. C., 583.

It is further urged that plaintiff should not be allowed to recover damages because of the fact that there was on the record a deed in which *feme* defendant had conveyed the property to her children, reserving only a life estate; that plaintiff is affected with constructive notice of the terms of such a deed, and is therefore barred of any recovery; defendant citing *Joyner v. Crisp,* 158 N. C., 199, in support of her position.

In *Joyner v. Crisp* it was held that the obligations of the contract, the subject-matter of litigation, were to be performed as an entirety, and the parties were relieved of same, and of all liability thereunder because it appeared on the face of the contract itself that, in substantial and material features, there was an inability to perform. The portions of the opinion as to the effect of notice must be understood in reference to the conditions there presented, and are not applicable to the facts of this record.

Under the old system of administering justice, when legal and equitable rights were to be sought in the two forums of law and equity
(412) the remedy by specific performance was enforced on the equity side of the docket, and while damages were sometimes awarded when specific performance could not be obtained, this rule was ordinarily refused if it was made to appear that the plaintiff was aware that speci-

fic performance could not be obtained when the suit was first instituted, or before that time, It was regarded, to some extent, as a fraud on the jurisdiction to bring the suit in equity under such circumstances. But it was never understood that a claim for damages could not be recovered if the suit therefor had been brought in the proper forum, *i.e.,* on the law side of the docket, and since legal and equitable rights are now sought and obtained in one and the same court, there is usually no reason why, in case of wrongful breach of contract, damages should not always be allowed when, for any good reason, specific performance cannot be obtained.

Speaking to this question in Pomeroy on Contracts, sec. 480, the author says: "One further question remains to be considered: whether the reformed procedure, adopted in so large a portion of the States, has abrogated or modified any of the foregoing rules concerning the recovery of damages in the action for a specific performance. While that procedure does not purport to make any changes in legal and equitable rights, duties, and remedies or reliefs, it does abolish all distinctions between legal and equitable actions and provides one civil action for the trial of all controversies in which legal and equitable causes of action and defenses may be united, and legal and equitable remedies may be granted by a single judgment. In other words, this procedure expressly and intentionally removes at one blow all the ground and reasons upon which, under the ancient system, the rule was based which forbids the award of damages in equity suits. Independently of any authority, it would seem to be perfectly clear that the general rules which had been established as a part of the former procedure had been materially modified by this sweeping reform. The question thus suggested has been directly answered by the New York Court of Appeals. An action was brought by a vendee praying the specific enforcement of a contract. Through a failure of the defendant's title a specific performance was impossible, and this inability was known to the plaintiff before the commencement of his suit. The complaint alleged all the facts necessary to show a cause of action for damages, as well as for a specific enforcement, but only demanded the latter relief. The Court refused the specific performance, but held the plaintiff entitled to recover damages for the defendant's breach of the contract. Admitting the rule to have been settled, under the former procedure, that where a plaintiff was aware of the inability at the time of commencing his suit equity would not retain the case and give damages, the Court declared that this rule had been abrogated by the Code, and it laid down the general doctrine as follows: If a complaint states facts constituting a (413) cause of action for specific performance, and also one for damages for a breach of contract, a failure of the first will not prevent his

recovery on the second, whatever may have been the prayer for relief, citing *Sternburger v. McGowan,* 12-20 and 21. And, assuredly, in the absence of any facts tending to show fraud or imposition, avoiding the contract or creating an estoppel, damages for wrongful breach of contract to convey are not now denied merely because the party seeking relief was aware, at the time of the contract, or before suit, that the other had no title. It is well understood that many contracts of this kind are entered into under just these circumstances, the parties believing they could obtain the title, and being allowed till the time of trial to procure and tender it. *May v. Getty,* 140 N. C., 311.

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

No error.

CLARK, C. J., concurring: There is nothing in the Constitution of North Carolina which disabled the Legislature from providing that a married woman can "contract as if single." If she can contract, then she is liable for breach of her contract. The contract in this case was for land, and if for any reason, as the refusal of a husband to give his written consent or for lack of title, or for any other cause, the court can not decree specific performance, than an action for damages lies as in all such cases. Indeed, where there is a breach of contract to convey lands the party aggrieved is never compelled to bring specific performance, which is a proceeding in equity, but he has his option to bring an action for damages for the breach, as the plaintiff has done in this case.

Chapter 109, Laws 1911, is as broad as it is possible to make it (except as to contracts between man and wife) in providing that "Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried." The act then proceeds to say that, as to "conveyances of her real estate," there must be the written assent of her husband as required by the Constitution. This statute of 1911 is the expression of the constitutional body authorized to make the laws, and it is immaterial what was the law formerly in that respect. We know that it has been held differently by the Court, or the statute would not have been necessary.

It is true that in this case liability is enforcible against the married woman. But responsibility is the correlative of freedom and of liberty.

Only those are irresponsible who are incompetent for lack of ma-
(414) turity—as minors or "in chains," as convicts, idiots, and lunatics.

Our Constitution and legislatures, responding to the growing enlightenment and the advancing sense of justice of the age, are taking

women out of that class. Whenever the Legislature conceded the right to contract there went with it the liability upon the contracting party to become liable for breach of contract.

Down to the Constitution of 1868 the badges of inferiority imposed upon married women by the barbarism of the Middle Ages, which made them practically the chattels of their husbands, existed in the laws of North Carolina. Till then married women were *non sui juris* in this State. The Constitution made them fully and in every respect *sui juris,* save only in the restraint upon alienation imposed by requiring them to obtain the written consent of their husbands to conveyances of their realty. This was the sole restriction upon the control of her property by a married woman recognized by the Constitution, and that has been long abolished in England and in nearly all the States of this Union. The requirement in our Constitution of a privy examination is limited to conveyances by the husband of his allotted homestead.

Down to 1868 in this State, on marriage all of the wife's property went into the possession or ownership of the husband. We went even beyond the common law in depriving a wife of her inchoate right of dower until the act of 1867, which "restored the common-law right of dower." Notwithstanding the great change so clearly made in the Constitution as to the property rights of married women, the judges then on the bench, educated under the former system, were not able to fully recognize it, and made many decisions more in accordance with former ideas than with the spirit and letter of the Constitution.

If the plain letter of the Martin act did not fully express its intention to confer untrammeled right of contract upon married women, it should be construed in the light of the numerous statutes, all in the same direction, changing the decisions of the courts which did not accord with the Constitution. Among them may be named Rev., 2095, which provides that a married woman can draw out her money in bank by her own check and that her husband's check will not be valid for that purpose, as formerly; that she can be a free trader, Rev., 2112-2118; that she can hold building and loan stock, Rev., 3885; that when a building is built or repaired on her land with her consent or procurement she shall be deemed to have contracted for the same, Rev., 2016; that she may sue without joining her husband when the action concerns her separate property, Rev., 408; that an execution can issue against her property; that the statute of limitations runs against her as against any other person *sui juris;* that the savings from her separate estate are her separate property, Rev., 2100; that if the husband abandons her she can sell and convey her real property as if unmarried, Rev., (415) 2117; that her earnings shall be her own and not subject to control of her husband, and that compensation for any tort to her person

or her property and damages for physical and mental anguish suffered by her, she alone can recover, and without joining her husband, Laws 1913, ch. 13; that if she owns land for life or a longer period she shall be a freeholder, Laws 1915, ch. 22; and many other statutes changing decisions of the courts that had followed the ancient ideas as to the incapacity and incompetence of married women. In short, the act of 1911, known as the "Martin act," simply sums up a long line of statutes and culminates by recognizing in married women the right to make any and all contracts as fully as if they had remained single, or that their husbands could make, save only contracts between husband and wife under Rev., 2107, as to which the presumption in law remains that the husband will take advantage of the wife and that the wife is incompetent to prevent it, and that the preventive is the wisdom of some adjacent magistrate who shall supervise such contracts. With that exception there is no restraint upon the contracting powers of married women.

As to wills, married women are equally untrammeled. As to conveyances there is the constitutional restraint upon alienation, that the wife must have the written consent of the husband to conveyances of her realty. There is no corresponding restraint upon the husband, who can make a valid conveyance without his wife's consent, subject only to the contingency of dower if she outlives him. There is a further restriction in the privy examination of the wife, which is still required in North Carolina, though it exists only in four other States of the American Union, and has long since been abolished in England. Whether this requirement is a greater reflection on the honesty of the husband or on the competency of the wife is an open question.

Taking, therefore, the language of the Constitution and the entire drift of legislation since, it is very certain that the intent of the Martin act to confer upon married women entire freedom of contract, in every respect, except with her husband, whether it affects their real or personal property, is beyond question.

BROWN, J., dissenting: It must be admitted that the contract, for a breach of which the plaintiff seeks damage, acts directly upon the *feme* defendant's land, and not incidentally. By it she contracts to convey to plaintiff certain lands owned by her, and it could be specifically enforced had her privy examination been taken. If any legal question has ever been settled by repeated decisions of this Court it is that the deed or contract of a married woman charging her real estate in this State is a nullity unless her husband joins and her privy examination is taken. *Scott v. Battle,* 85 N. C., 184; *Farthing v. Shields,* 106
(416) N. C., 289; *Ball v. Paquin,* 140 N. C., 83; *Bank v. Benbow,* 150 N. C., 781; *Council v. Pridgen,* 153 N. C., 443.

The assent of the husband is a constitutional requirement. The necessity for the privy examination is not only required by Rev., 952, as to all her lands, and by the Constitution as to the homestead, but it is made a necessary requisite by the so-called Martin act, itself. So carefully has this Court guarded this protection to married women that in *Smith v. Bruton,* 137 N. C., 79, it is held that a married woman cannot bind herself by agreeing to arbitrate the question of title to land owned by her. It might result in conveying away her land by an award of arbitrators without the necessary assent of her husband and privy examination.

I am unable to comprehend how this married woman can be mulcted in damages for a breach of a contract which has been repeatedly held to be an absolute nullity, as much so as if it had never been reduced to writing. How can she be civilly liable on a contract which in law has never had any existence?

In *S. v. Robinson,* 143 N. C., 622, *Mr. Justice Walker* says: "The defendant cannot be criminally liable under Rev., sec. 3367, unless the contract with the prosecutor by which she rented and agreed to cultivate the land was valid and binding upon her. This was decided in *S. v. Howard,* 88 N. C., 650, as to an infant, whose contracts are merely voidable, and the principle is applicable with greater force to a married woman, whose contracts, as a general rule, are void." In *Howard's case, Justice Ashe,* for the Court, says: "The case then results in this, that the State seeks by this indictment to hold the defendant amenable to the criminal law for the violation of a void contract. With all due respect to the opinion of those who entertain such a proposition, we must say that it seems to us preposterous." See, also, Bishop on Statutory Crimes, sec. 131; *S. v. Plaisted,* 43 N. H., 413; *Jones v. State,* 31 Texas C. R. Appeals, 252; 2nd McLean's C. R. Law, sec. 846.

I say, with all deference, that it is, to my mind, a solecism to hold that an action for damages may be maintained for a breach of a contract that is so utterly null and void that a court cannot compel the defendant to specifically perform it. It is suggested that if a married woman borrow money and give her individual note for it, judgment may be obtained against her if she fails to pay it, and her lands sold under execution, and thus she will use them, without her husband's consent, and without her privy examination.

That is now undoubtedly true, because the execution of the note constitutes a valid contract, and privy examination and consent of husband are not prerequisite to its validity. Consequently, its performance may be enforced by legal process. But in this case the attempt is being made to give force and vitality to a contract that has never had legal existence. How can the Court give any judgment against this (417)

defendant for breach of a contract which she has never executed according to the law of the land?

MR. JUSTICE WALKER concurs in this opinion.

Cited: Wallin v. Rice, 170 N. C., 418, 419 (j); *O'Neal v. Borders,* 170 N. C. 485 (2p, 3p, 4p); *Graves v. Johnson,* 172 N. C. 179 (2p, 3p, 4p); *Thrash v. Ould,* 172 N. C. 713 (2g, 3g, 4g); *Pope v. McPahil,* 173 N. C. 240 (6f); *Satterwhite v. Gallagher,* 173 N. C. 526, 529 (j); *Everett v. Ballard,* 174 N. C. 18 (f); *Everett v. Ballard,* 174 N. C. 19 (j); *Stallings v. Walker,* 176 N. C. 324 (j); *Grocery Co. v. Bails,* 177 N. C. 299 (g); *Sills v. Bethea,* 178 N. C. 317 (f); *Deal v. Wilson,* 178 N. C. 605 (6f); *Miles v. Walker,* 179 N. C. 484 (4f, 6f); *Foster v. Williams,* 182 N. C. 635 (p); *Tise v. Hicks,* 191 N. C. 613 (p); *Colwell v. O'Brien,* 196 N. C., 510 (f); *Boyett v. Bank,* 204 N. C., 645 (p); *Grant v. Brown,* 212 N. C. 40, (6g); *Martin v. Bundy,* 212 N. C. 444 (g); *Peele v. LeRoy,* 222 N. C. 126 (g); *Buford v. Mochy,* 224 N. C. 247, 249 (j).

JACK WALLIN ET AL. v. JONAH RICE.

(Filed 15 December, 1915.)

Deeds and Conveyances—Husband and Wife—Conveyance to Husband—Certificate—Statutes.

It is necessary to the validity of a deed to lands, made by the wife to her husband, that the justice of the peace find and certify in his certificate of probate that, at the time of her privy examination, the contract or deed was not unreasonable or injurious to her; and, where the deed is void for noncompliance with the statute, her covenant of warranty materially affecting her estate is also ineffectual and cannot operate to estop her or those claiming under her.

CLARK, C. J., dissenting.

APPEAL by defendant from *Long, J.,* at September Term, 1915, of MADISON.

Civil action.

Guy V. Roberts, E. Z. Ray and Martin, Rollins & Wright for the plaintiffs.

P. A. McElroy, C. B. Marshburn, Mark W. Brown for the defendant.

BROWN, J. Plaintiffs are six of the heirs at law of Emily A. Rice, wife of defendant, who died without issue 8 April, 1915. On 3 May, 1913, she executed a deed in fee to defendant, describing the land in controversy, for the recited consideration of $1,000, containing full covenants of warranty. This deed was not executed in accordance with sec. 2107 of the Revisal, in that the justice of the peace did not find and certify in his certificate of probate that at the time of her privy examination the contract or deed was not unreasonable or injurious to her. The failure to observe the requirements of the statute makes the deed absolutely void. *Singleton v. Cherry,* 168 N. C., 404; *Butler v. Butler,* 169 N. C., 584.

The position that plaintiffs are estopped from claiming the land by the covenant of warranty in the deed is untenable. If the deed is void for noncompliance with the statute, the covenant of warranty is likewise void, as it is a contract between husband and wife materially affecting her estate.

Where the deed is void the mere fact that it contains a cove- (418) nant of warranty will not make it operative by way of estoppel, for, to make a warranty binding, there must be some estate conveyed to which the warranty may be annexed. A deed void as being given in contravention of a statute works no estoppel. Thus, a married woman will not be estopped by a deed not executed in the mode provided by statute. *Green v. Branton,* 16 N. C., 504; *Smith v. Ingram,* 130 N. C., 106; *Scott v. Battle,* 85 N. C., 184.

As the contract is void, the defendant cannot recover damages from his wife's estate for its breach, and that is especially true in this case, as the jury have found that defendant paid no consideration for the land.

No error.

CLARK, C. J., dissenting: This is a case of peculiar hardship. The defendant and his wife lived together for sixteen years on the tract of land in controversy. She was an invalid much of the time, and he was barely able to make a living out of the land for himself and wife. Anticipating her death, she procured a magistrate to draw a deed from her for the land to her husband and duly executed the same, the justice taking her privy examination and telling her that it was all right. Since her death her brothers have brought this action to take the land away from her husband.

The jury found that there was no fraud on the part of the husband, and that the conveyance by the wife to the husband was not injurious to her nor unreasonable. Moreover, the deed contains full covenants of warranty and was executed 5 May, 1913, more than two years after the

Martin act, ch. 109, Laws 1911, which gives to all wives full right to make contracts affecting their real or personal property. *Warren v. Dail, ante,* 406. It is true that act excepts *contracts* under Rev., 2107. *Butler v. Butler,* 169 N. C., 584. That presents the question whether sec. 2107 is constitutional if the Court extends it to *conveyances.*

The Constitution of 1868 made a complete change in the status of married women as to their property rights. It provided, Art. X, sec. 6, that "The real and personal property of any female in this State quired 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"; that it should not be liable for the debts of her husband (as formerly), and "may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

It will be seen by this reference to the organic law that absolute control of their property in every respect was guaranteed to all wives, save in the single particular that in the conveyances of her realty the written assent of her husband was required. The addition of the (419) further requirement that the privy examination of the wife must be taken to deeds, and that in conveyances to her husband there must be the approval of some justice of the peace, are in open violation of the constitutional provision which gave wives the right to convey with "the written assent of the husband."

There is no justification or authority for this addition to the Constitution by legislative enactment or judicial construction. In England neither of these requirements obtains. In only four other States of the American Union, besides this, is the requirement of the privy examination retained, and in those it is not, as here, in violation of a guarantee in the Constitution. It may be doubted if in any other State there is a requirement that a magistrate shall approve a contract between husband and wife.

The retention of these archaic requirements here is due to the survival of the common-law conception of the inferiorty of married women. These statutes were passed before the Constitution of 1868, and were retained or brought forward since. They express the ideas of the time when wives were practically the chattels of their husbands. Down to 1868 the property of a woman, upon marriage, became the property of her husband, and her person became subject to chastisement at his will. *S. v. Rhodes,* 61 N. C., 453.

The requirement of a privy examination (Rev., 952), and of the approval of some justice of the peace (Rev. 2107), are based upon a conclusive presumption of law that the wife is an incompetent, without sound judgment of her own, and that the husband will impose upon her

unless there is the supervision of some wise justice of the peace, who is usually selected by the husband. These requirements are a constant reminder to wives that they are, by the laws of this State, still deemed inferior beings, in spite of the guarantee in the Constitution that they shall have free control of their own property. These requirements are, besides, worthless, because if there is fraud and undue influence, to the knowledge of the grantee, the conveyance can always be set aside, just as would be the case if there was no such action of the justice of the peace required. The aggregate of these useless fees is a considerable tax upon conveyances, besides the inconvenience and annoyance.

It is not necessary, however, to go further into this matter, as it has already been fully discussed in the dissenting opinions in *Weathers v. Borders,* 124 N. C., 616; *Walton v. Bristol,* 125 N. C., 426-432; *Smith v. Ingram,* 132 N. C., 966; *Harvey v. Johnson,* 133 N. C., 361; in the concurring opinion in *Ball v. Paquin,* 140 N. C., 96; and in the dissenting opinion in *Butler v. Butler,* 169 N. C., 584. and other cases.

The discriminations against married women, which have been discussed in the above dissents, have now been removed by successive statutes (see concurring opinion in *Warren v. Dail, ante,* 406), except only the above provisions as to privy examination and the (420) approval of a justice, under sec. 2107, as to contracts with husbands. These, doubtless, will be repealed also in conformity to the Constitution.

The sole restraint in the Constitution upon alienation by the wife is that the husband must give his written assent to the wife's conveyance, though he can convey his property (except his "allotted" homestead) without her consent. His conveyance is valid without the wife's assent, subject to the contingent right of dower.

The requirement in the Constitution of the privy examination of the wife is confined to the conveyance by the husband of *his* "allotted" homestead, *Mayho v. Cotton,* 69 N. C., 289; *Dalrymple v. Cole, ante,* 102, and this is the only restraint upon alienation by him.

Cited: O'Neal v. Borders, 170 N. C. 485 (f); *Foster v. Williams,* 182 N. C. 635 (f); *Smith v. Beaver,* 183 N. C. 507 (f); *Davis v. Bass,* 188 N. C. 202 (f); *Best v. Utley,* 189 N. C. 361 (f); *Barbee v. Bumpass,* 191 N. C. 522 (f); *Caldwell v. Blount,* 193 N. C. 562 (f); *Capps v. Massey,* 199 N. C. 198 (f); *Fisher v. Fisher,* 217 N. C. 75 (f); *Fisher v. Fisher,* 218 N. C. 46 (f); *Buford v. Mochy,* 224 N. C. 238 (f); *Daughtry v. Daughtry,* 225 N. C. 350 (f); *McCullen v. Durham,* 229 N. C. 425 (g).

FANNIE SCHAS v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 15 December, 1915.)

1. Appeal and Error—Prejudicial Error.

Mere error in the trial of a cause will not induce the Supreme Court to order a new trial; for it should reasonably appear that the error was prejudicial to the appellant's right and that the new trial sought would result differently, if ordered.

2. Insurance, Life—Application—Serious Illness—Questions for Jury.

Where the applicant for a policy of life insurance has been required to state his last serious illness, and there is conflicting evidence as to whether a certain illness of his was of a serious character, and the insurer seeks to invalidate the policy on that ground, it presents a question for the determination of the jury.

3. Same—Serious Injury—Temporary Illness—Permanent Injury.

An illness of the insured sufficient to invalidate a policy of life insurance, where the insured contends that the applicant had made a false statement thereof in his application for the policy, must be of such character as to permanently affect the health of the insured, and not such as is transitory or does not affect the desirability of the risk, and expert medical evidence that a habit of the insured, existing before the application was made, by the impairment of his health produced a serious illness, is insufficient to invalidate the policy, it having been established by the verdict of the jury that it had not done so.

APPEAL by defendant from *Webb, J.*, at February Term, 1915, of BUNCOMBE.

Mark W. Brown for plaintiff.

Bourne, Parker & Merrimon and T. F. Davidson for defendant.

(421) WALKER, J. This case was before us at a former term and is reported in 166 N. C., 55. We then ordered a new trial for errors committed in the trial below. At the February Term, 1915, it was again tried upon issues and the jury returned the following verdict:

1. Did the insured, Lewis Schas, at the time of signing the application for the policy sued on, represent that he had not been under the care of a physician within two years next preceding date of said application, as alleged in the complaint? Answer: Yes.

2. Had the insured, Lewis Schas, been under the care of a physician within two years preceding the date of said application? Answer: No.

3. Did the insured, Lewis Schas, represent at the time of making his application for the insurance that the policy should not take effect

until the first premium had been paid during his good health Answer: Yes.

4. At the time of the payment of said first premium, was said Lewis Schas in good health? Answer: Yes.

5. Did the insured, Lewis Schas, at the date of his application for the policy of insurance, represent that he had not had any serious illness or disease, except diseases incident to childhood? Answer: Yes.

6. Had Lewis Schas had any serious illness or disease, except diseases incident to childhood, at the time of his application for the insurance policy sued on? Answer: No.

7. Was the death of insured brought about by his own intentional self-destruction, as alleged in the answer? Answer: No.

The defendant has appealed from the judgment rendered upon the verdict. The questions of evidence are unimportant and call for no special comment. Some of the questions were not answered, and, therefore, no harm was done, and where they were asked by defendant, and ruled out, it does not appear what the answers would have been or what was expected to be proved, so we can see that there was prejudice. *In re Smith's Will,* 163 N. C., 464; *S. v. McKenzie,* 166 N. C., 290; *S. v. Lane, ibid.,* 333.

Harmless error is not ground for a reversal. The ruling must be material, and prejudicial to appellant. The instruction as to what constituted "serious illness" was substantially correct, and we think that the jury must have fully understood what is meant by the term, as used in the policy. On the conflicting state of the evidence as to whether the illness of the deceased was a serious illness, it was for the jury to whom the case was submitted to decide. The question propounded to the applicant did not require him to give information as to the last illness he had suffered, but the last serious illness. Not every illness is serious. An illness may be alarming at the time, or thought to be serious by the one afflicted, and yet not be serious is the sense of that term as used in insurance contracts. An illness that is temporary in its duration, and entirely passes away, and is not attended, nor likely to be (422) attended, by a permanent or material impairment of the health or constitution, is not a serious illness. It is not sufficient that the illness was thought to be serious at the time it occurred, or that it might have resulted in permanently impairing the health. *Ins. Co. v. Wilkinson,* 13 Wall., 222, 20 U. S. (L. Ed.), 617. "A cold may be, and sometimes is, followed by pneumonia, pleurisy, abscess of the lungs, and consumption; but to hold that because a cold may be attended or followed by such consequences it is a serious illness, and that a failure to mention such in response to an inquiry in an application for insurance as to the nature and character of any serious illness the applicant has suffered,

would result in invalidating almost all contracts of insurance, the covenants of which are based upon the statements in the application as warranties; for, if a careful investigation should be made into the lives of persons insured, in almost every life there would be found some incident of illness of such ordinary occurrance and insignificance in its effect, yet of possible seriousness, which the applicant, without careful scrutiny and accurate recollections of his past life has overlooked to mention." *Em. Ho. of Col. Woodmen v. Prater,* 20 Am. and Eng. Anno. Cases, 287, and notes. It has been held that if the affliction is of a permanent character it must certainly be a serious one; and if it is merely temporary, and to pass away without serious results, it cannot well be said to render the person unsound in his general health. The word "serious" is not generally used to signify a dangerous condition, but rather to define a grave, important, or weighty trouble. *Brown v. Ins. Co.,* 65 Mich., 306. Serious or severe illness does not include the ordinary diseases of the country which yield readily to medical treatment, and, when ended, leave no permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury and tend to shorten life. *Holloman v. Ins. Co.,* 1 Woods, 674 (s.c., 12 Fed. Cases, No. 6623).

In Webster's Dictionary the word "serious" is defined as something "giving rise to apprehension; attendant with danger; as a serious injury or condition; important, weighty, not trifling, grave"; and we find substantially the same definitions given in the other dictionaries. The Court, in *Caruthers v. Ins. Co.,* 108 Fed., 487, gives the same meaning to those words and states that, as the company saw fit to use the word "serious," it should not complain that the applicant failed to mention in reply to its questions as to whether he had ever been ill, every slight ailment. It was held in *M. B. Society v. Winthrop,* 85 Ill., 542, that a statement in an application for life insurance, that the applicant has had no serious illness, will be construed to mean that he has never been so ill as to permanently impair his constitution, and render the risk unusually hazardous. *Justice Walker,* for the Court, said in that case, at page 542: "What is to be understood by 'serious illness'?

If any sickness which may terminate in death, then it must
(423) embrace almost every distemper in the entire catalogue of diseases. To give such an interpretation to this expression would, we have no doubt, defeat a recovery on a large majority of the certificates issued by the society. The true construction of the language must be that the applicant has never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous. It seems to us that this is the only reasonable construction that can be given to the language. It is reasonable and is fair to both parties, and works no hardship or injustice to any one, whether the answers are

warranted to be true or only as a fair statement of facts, honestly and truly given as understood by the applicant." See, also, *French v. F. & C. Co.*, 135 Wis., 259; *Drakeford v. Knights of Damon*, 61 S. C., 338; *Woodman v. Prater*, 24 Okla., 214; *Hockaday v. Jones*, 56 Pac., 1054; *Daniel v. Mod. Woodmen*, 118 S. W., 211, 213; *Ins. Co. v. Wilkinson*, *supra*.

We are inclined to the opinion, from the medical testimony, that the trouble which, as the defendant alleges, afflicted the insured, may have been, in some circumstances, of a serious nature, if the result of constant indulgence. If it was a physical and mental condition of the patient, which supervened a long and persistent course of self-abuse, or masturbation, and was calculated to impair permanently his constitution, it was serious within the meaning of any definition we have found; but the jury, we think, have so effectually disposed of the defendant's contention in regard to the existence of any such condition or illness that any discussion of the meaning of words would be futile. We must assume, in the absence of the charge, which was not sent to this Court, that the judge properly submitted the issues to the jury, other than in the instruction to which exception was taken, and, as to this one, it may be said, that defendant's contention practically was that the habit of the applicant was of such a kind as to impair his health and vigor, if he was in fact addicted to the degrading and vicious practice. The jury have virtually found that he was not, for if that is the inevitable or even probable tendency of the habit, as testified by the physicians, they have found that his health was good, or sound, or, as we understand it, that it was unimpaired when he paid the first premium, and this could scarcely have been so if his had been a victim of onanism or self-pollution. As was said substantially in the *Craven will case*, 169 N. C., 561: There are many exceptions in the case, but on a careful examination of the record we do not think that, if there was any error in the rulings of the court to which they were taken, it constitutes sufficient ground for granting a new trial. It is not any and every error committed during the course of a trial that will induce an appellate court to set aside a verdict and judgment and award a new trial, as before this is done there should be both error and prejudice to the appellant. If he is not harmed by the ruling there is no reasonable ground of com- (424) plaint. We also referred to this principle in *S. v. Smith*, 164 N. C., 480, 79 S. E., 982, and, more recently, in *S. v. Heavener*, 168 N. C., 156, and *Ferebee v. Berry*, 168 N. C., 282.

We find this in the record at page 89: "The court gave the contentions of both parties fully, and charged upon the law applicable to the case, as the court understands it, keeping in mind the decision rendered in this case by the Supreme Court." Taking a broad and practical view

of the case, upon its legal merits, as disclosed by this record, if there has been any error it is manifestly of such little moment as not to have affected the verdict in the least.

The defendant has had two fair opportunities to defeat the plaintiff's recovery, and we are convinced that should there be another trial the result would be the same. We are not disposed to prolong the litigation upon trivial grounds, even if there had been error which we can see had not prejudiced the defendant. The case has been fairly tried in accordance with the directions given in the former opinion of this Court, and it is perfectly evident that the juries were against the defendant's contentions on the facts.

No error.

Cited: S. v. Davis, 175 N. C., 729 (1f); *Brewer v. Ring & Valk,* 177 N. C. 484 (1f); *S. v. Pitts,* 177 N. C. 545 (1f); *Bank v. Pack,* 178 N. C. 390 (1f); *Cotton Mills v. Hosiery Mills,* 181 N. C. 35 (1f); *Cauble v. Express Co.,* 182 N. C. 451 (1f); *Snyder v. Asheboro,* 182 N. C. 710 (1f); *Austin v. Crisp,* 186 N. C. 618 (1f); *Barbee v. Davis,* 187 N. C. 85 (1f); *Hunt v. Eure,* 189 N. C. 493 (1b); *Newbern v. Hinton,* 190 N. C. 111 (1f).

H. B. CRAVEN v. MARTHA A. MUNGER.

(Filed 15 December, 1915.)

1. Transfer of Causes—Removal of Causes—Plaintiff's Residence—Administrators and Executors—Court's Discretion—Statutes.

Where a plaintiff alleges that he is a resident of a certain county wherein he has brought his action to recover for services he has rendered personally to the defendant, the administrator of a deceased person (Rev., sec. 424), it is a matter within the unreviewable discretion of the trial judge as to whether he will transfer the cause for trial to the county wherein the defendant resides, and which had been the residence of the deceased, upon the latter's motion, on the sole ground that "the convenience of the witnesses and the ends of justice would be promoted." Revisal, sec. 425 (2).

2. Executors and Administrators—Personal Debt — Venue — Election of Plaintiff—Statutes.

An action brought to recover for services rendered personally to an administrator, not for a debt alleged to be due by the deceased or for the settlement of his accounts or upon his bond as administrator, is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. Revisal, sec. 424.

CRAVEN *v.* MUNGER.

APPEAL by defendant from *Long, J.*, at Fall term, 1915, of BUNCOMBE.

(425)

No Counsel for plaintiff.

Guion & Guion, Moore & Dunn, and A. S. Bernard for defendant.

CLARK, C. J. This is an action to recover a money judgment for services rendered by plaintiff to the defendant. The defendant moved to remove to Craven County, where the defendant resides, upon the ground that "the convenience of witnesses and the ends of justice would be promoted by the change." The court denied the motion and the defendant appealed.

The first line of the plaintiff's verified complaint avers that "the plaintiff is a resident of Black Mountaian Township, Buncombe County, North Carolina, and at the time of the beginning of this action the defendant is a resident of said township, county and State." In the petition filed by the defendant for removal it is not denied that the plaintiff is a resident of the county of Buncombe, but it is alleged that the services rendered were to her in the settlement and management of her husband's estate, of which she was administratrix; that the services were rendered in New Bern, Craven County, and that the witnesses and evidences necessary for her defense are in Craven, where the plaintiff was also resident prior to his removal to Buncombe County, and that he has brought this action in that county "not by reason of the fact that he was or is now resident of said county, but by reason of its remoteness from Craven," and that she will not be able to attend the trial in Asheville.

The plaintiff was entitled to choose the county of his residence as the forum in which the cause should be tried. Rev., 424. The defendant in the petition does not deny that the plaintiff was, at the commencement of the action, and is now a resident of Buncombe. She puts her motion for removal upon the ground that "the convenience of witnesses and the ends of justice will be promoted by the change." Rev., 425 (2). Said section prescribes that in such case "the court *may* change the place of trial." It has always been held that when removal is sought under this subsection it is a matter which rests entirely in the discretion of the court, and is, therefore, not reviewable.

In *Lassiter v. R. R.*, 126 N. C., 508, it is held: "The court in its discretion may change the place of trial in the three cases named in the subsections" of what is now Rev., 525, and it is said: "The second of these is: When the convenience of witnesses and the ends of justice would be promoted by the change, and the court, in its discretion, granted the removal upon that ground, and such action is not reviewable."

In *Baruch v. Long,* 117 N. C., 511, the Court says: "The judge, in his discretion, might remove the action if the convenience of witnesses or the ends of justice would be promoted by the change, or if satisfied that a fair trial cannot be had in the county where the action is pending, but he cannot be required to remove the cause upon the grounds (426) stated."

In *Eames v. Armstrong,* 136 N. C., 395, this paragraph in *Baruch v. Long* is quoted verbatim and approved, adding that the cause "might well have been removed to the county of Montgomery if the essential evidence upon which the case depended was located in that county, but this was a matter within the legal discretion of the judge, and not reviewable by us in the absence of any suggestion of abuse." It does not appear, and it is not averred here, that there was an abuse of discretion by the court, but merely that upon the facts appearing the judge ought to have used his discretion and removed the cause. In *Belding v. Archer,* 131 N. C., 308, the Court said: "His Honor had the power under the statute to remove the case to Graham for the convenience of witnesses."

The statute is explicit that the judge "may" remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be served thereby. The language of itself makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this Court has sustained the plain meaning of the words as giving the judge a discretionary power which is not reviewable by us, save in the case of gross abuse. This we cannot impute to the learned judge who refused this motion, and upon the evidence before him refused to find as a fact that the ends of justice would be served by such removal or to remove the case for the convenience of witnesses.

It is fair to observe that it would be as far and probably as inconvenient for the plaintiff, who is superintendent of a graded school, to go from Asheville to New Bern to attend trial, with the possible contingency of continuances, as for the defendant, who is not in any employment, to go from New Bern to the pleasant health resort at Asheville. It would doubtless be more convenient to the defendant to have the trial in New Bern, but the statute gives the plaintiff in such case the right to bring the action at the place of his residence.

The defendant, in her petition, also avers that the action is against her in her capacity as administratrix, but the allegations in the petition for removal cannot change the cause of action as stated in the complaint. However, on the defendant's own statement, this action is neither upon her official bond nor against her in her capacity as administratrix, under Rev. 421. It is not for a settlement of her accounts as

administratrix nor even for a debt of her intestate. *Kelly v. Odum,* 139 N. C., 282, cites *Haley v. Wheeler,* 49 N. C., 159, in which *Pearson, J.,* says: "It is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time." *Stanley v. Mason,* 69 N. C., 1; *Foy v. Morehead, ib.,* 512; *Bidwell v. King,* 71 N. C., 288; *Clark v. Peebles,* 100 N. C., 352; *Alliance v. Murrell,* 119 N. C., 124; and *Thomas v. Ellington,* 162 N. C., 131, cited by defendant, were all cases in which the action was (427) brought either upon the official bond, or to settle the estate, or against the executor or administrator on a debt of the intestate and in their official capacity.

This action for services rendered to the administratrix is a mere personal action against the defendant, which can be brought at the election of the plaintiff in the county where either he or the defendant resides. Rev., 434. In Devane v. Royal, 52 N. C., 426, it is held that the liability of an executor for counsel or other assistance in the discharge of his duties is a personal debt and not one against the executor as such. This has been often cited with approval, see citations thereto in the Anno. Ed., especially *Kelly v. Odum,* 139 N. C., 282; *Banking Co. v. Morehead,* 122 N. C., 323; and *Lindsay v. Darden,* 124 N. C., 309.

Affirmed.

Cited: Ludwick v. Mining Co., 171 N. C. 62 (1f); *Whisnant v. Price,* 175 N. C. 614 (2g); *Snipes v. Monds,* 190 N. C. 192 (2p); *Montford v. Simmons,* 193 N. C. 325, 326 (2b); *Causey v. Morris,* 195 N. C. 534 (1d); *Howard v. Coach Co.,* 212 N. C. 204 (1f); *Rose v. Patterson,* 218 N. C. 214 (2f); *Indemnity Co. v. Hood, Comr.,* 225 N. C. 362 (1f).

O. D. WHEELER v. CHARLOTTE CONSOLIDATED CONSTRUCTION COMPANY ET AL.

(Filed 15 December, 1915.)

1. Deeds and Conveyances—Maps—Streets—Dedication—Municipal Acceptance.

Where a tract of land contiguous to a city is purchased and laid off into lots, streets, etc., for residential purposes, and a map thereof made and deeds made to the purchaser of these lots with reference to the lot numbers or streets platted, and the map is kept in the office of the promoters, the platting of the land and conveying the lots as stated is a dedication of the streets to the public in general and to the purchasers of the lots in particular, the intention to dedicate being manifested by

the maps and deeds; and it is immaterial whether the streets were actually open at the time the lots were conveyed or whether they have been accepted by the municipality.

2. Deeds and Conveyances—Maps—Streets — Dedication — Obstruction—Nuisance—Injunction—Equity.

Where the owner of land has platted it into lots for residential purposes and dedicated the streets, neither he nor the purchasers of the lots from him may thereafter close the streets or use them for their private purposes against the interest of the other purchasers of the lots; and the remedy is by injunction or other proper remedy to have the nuisance abated.

WALKER, J., did not sit.

APPEAL by defendants from *Lane, J.*, at June Term, 1915, of MECKLENBURG.

Civil action upon agreed facts. From the judgment rendered the defendants appealed.

John M. Robinson for the plaintiff.

Tillett & Guthrie and Cansler & Cansler for the defendants.

(428) BROWN, J. The object of this action is to enjoin defendants from closing up by buildings, stables and other obstructions a strip of land designated upon the map of Dilworth, beginning at the point at which the "Boulevard" intersects with South Boulevard and extending with the width of said "Boulevard" one hundred feet up to the C. C. and A. R. R.

It appears that the defendants purchased a body of land contiguous to the city of Charlotte and laid it out as a residential suburb called Dilworth; that they had a map or plat made, showing all the lots and streets, which was on file in the office of the defendants, and referred to in the deeds; that on this map is delineated the streets and boulevards which are left open for public use; that the defendant sold and conveyed lots to purchasers with reference to this map and the streets thereon, and calling for the same in the deeds. A copy of the map is made a part of the record and shows on its face the street or boulevard running to the C. C. and A. R. R., that it is claimed the defendants have refused to keep open and upon which they are keeping stables and other obstructions.

The plaintiff is the owner of three lots in Dilworth, numbered on the map referred to, two of which were made directly to the plaintiff, and the other he acquired by *mesne* conveyance. The map herein referred to is made a part of the last named deed. This deed contains no re-

strictions or reservations in reference to the streets, parks and boulevards, as appears in some of the deeds made by the defendants. The defendants claim the ownership of the street in question and the right to maintain certain stables and horses thereon. There can be no doubt, from an inspection of the map, that the street which defendant claims as its property and, therefore, the right to obstruct, is clearly defined as a street on said map, as much so as the other streets delineated thereon. We think the appeal presents the question of the owner of certain property dividing same into lots and streets, making a map thereof, recording the map, and conveying certain of the lots by reference to said map, and then seeking to obstruct such streets under a claim of ownership.

It is useless to discuss the question at length. In our opinion, it has been settled against the contention of the defendants by repeated decisions of this and other courts.

In *Conrad v. Land Co.*, 126 N. C., 776, it is held that where lots are sold by reference to a map or plat representing a division of a tract of land into streets and lots, such streets are dedicated thereby, and the purchaser of the lots acquires the right to have the streets kept open. The same proposition is discussed and decided in the same way in *Hughes v. Clark*, 134 N. C., 462; *Grogan v. Haywood*, 4 Fed., 164. (429)

Platting the land into lots and streets and selling the lots by reference to the map dedicated the streets thereon to the public in general and to the purchasers of the lots in particular. The intention to dedicate is manifested by the maps and deeds. *Tice v. Whitaker*, 146 N. C., 376.

It is immaterial whether the streets were opened at the time of dedication or not; they must be at all times free to be opened as occasion may require. The acceptance or nonacceptance by the municipality does not affect the title thereto. *Hughes v. Clark, supra.* Injunction is the proper remedy, as is held in that case. The obstruction and closing up of the street creates a nuisance, and each purchaser can, by injunction or other proper proceeding, have the nuisance abated.

Affirmed.

WALKER, J., did not sit in this case.

Cited: Elizabeth City v. Commander, 176 N. C. 29 (1f); *Wittson v. Dowling*, 179 N. C. 545 (1g); *Stephens Co. v. Homes Co.*, 181 N. C. 339 (1f); *Homes Co. v. Falls*, 184 N. C. 430 (1d); *Irwin v. Charlotte*, 193 N. C. 112 (1f); *S. v. Burke*, 199 N. C. 459 (1d); *Gault v. Lake Waccamaw*, 200 N. C. 600, 601 (1d); *Davis v. Alexander*, 202 N. C. 135 (1p,

2f); *Somersette v. Stanaland,* 202 N. C. 687 (1f); *Ins. Co. v. Carolina Beach,* 216 N. C. 785, 786 (1f); *Broocks v. Muirhead,* 223 N. C. 233 (1f, 2f).

MARY BYRD ET AL. v. CAROLINA SPRUCE COMPANY.

(Filed 15 December, 1915.)

1. Deeds and Conveyances—Course—Natural Boundaries.

Where there is a call in the description to a given boundary in a conveyance of land, which is at variance with the course specified therein, the natural object will control the course, it being the evident intent of the parties that the line should be thus established, and not that a mere word, in which a mistake is more likely to occur, should control.

2. Same—Evidence.

Where the controversy involving title to lands is over the description of a boundary given in a deed, to wit: "Southwesterly course (along the top of a ridge) along the various windings so as to include all of the headwaters of B. Creek to his own line at Grassy Knob at the right-hand fork of B. Creek," and it is shown that the line existing between former owners had been recognized as following the "top of the ridge," and called for to Celo Mountain, thence to Grassy Knob, the southwesterly course, which would be in a straight line to "Grassy Knob," would not control, but would give way to the defined line following the various courses of the ridge, first to Celo and then to Grassy Knob.

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

Evidence of declarations of former owners as to the boundary line in dispute, being a marked and defined course between natural objects on the top of a ridge, when made forty years ago and before the controversy over the line arose, is sufficient under our authorities, and, where the evidence is sufficiently remote, declarations of shorter duration may be admitted in corroboration. *Sullivan v. Blount,* 165 N. C., 11, cited and applied.

4. Evidence—Declarations—Lands—Possession—Interests.

The rule of evidence making competent declarations as to the boundary of the owner of lands in possession, against his interest, applies to one claiming the lands under him.

5. Removal of Causes—Transfer of Causes—Fair Trial—Court's Discretion—Appeal and Error.

A motion to transfer a cause from one county to another in the interest of justice is addressed to the second discretion of the trial judge, and is not reviewable on appeal.

(430) APPEAL by defendant from *Harding, J.,* at August Term, 1915, of YANCEY.

Action to recover land. It is admitted that the plaintiffs and the defendant claim under the same party, and that the plaintiffs have the older title from the common source. The plaintiffs, other than J. R. Penland, are the heirs at law of Garrett D. Ray, and the defendant is the grantee of Harold Johnson and others, heirs of R. B. Johnson, under a deed executed in 1910, which calls for the Ray line.

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

"Beginning on the N. W. corner of his (James Ray's) 100-acre tract, a Spanish and bunch of sugar trees which he has a State grant for on the west side of Bowlin's Creeks, and running east 100 poles to a poplar; then along said eastwardly course the Hurricane or Black Mountain Ridge *to the top of said ridge,* a southwardly course along *the top* of said ridge to a stack of rocks on the Big Knob; thence an eastwardly course along *the top* of the ridge to the jumping off place at the head of Ailer's Creek, waters of Toe River; *then a southwesterly course along the various windings so as to include all the headwaters of Bowlin's Creek to his own line at Grassy Knob, at the right-hand fork of Bowlin's Creek;* then a north course along his line and Bowlin's Creek to the line of 200-acre tract sold J. Wheeler; then around with Wheeler's line to James Ray to the beginning corner of his 100-acre survey to a chestnut; then to the beginning."

There is no dispute as to the location of this description up to the line leaving the Jumping Off Place, and the whole controversy between the parties is as to the true location of this line, which reads in the description as follows: "Then a southwesterly course along the various windings so as to include all the headwaters of Bowlin's Creek to his own line at Grassy Knob, at the right-hand fork of Bowlin's Creek."

The plaintiffs contend that the words "various windings" refer to the windings of the ridge, and that in order to include all the headwaters of Bowlin's Creek the line must be run a southeasterly direction with a ridge to Celo Mountain, and then westwardly with a ridge to Grassy Knob, and the defendant contends that "various windings" refer to Bowlin's Creek and that the line must be run substantially straight a southwest course to Grassy Knob.

The plaintiffs introduced several witnesses who testified that there was a general reputation existing, some said 40 years and others 25, 30 and 35 years, when there was no controversy that the Ray line ran with the ridge from Jumping Off Place to Celo, and then with (431) the ridge to Grassy Knob. The defendant excepted.

The plaintiffs also introduced evidence tending to prove that more than twenty years ago R. B. Johnson built a fence and cut out a road along the ridge from Grassy Knob to Celo, and that he then said the

top of the ridge was the line between him and Ray; that there was a mica mine on the ridge, principally on the south side of the ridge, and that Johnson offered to lease it to one McMahon on the south side, but that he would not lease on the north side, as that was the Ray boundary. The defendant objected to the declarations of Johnson. Also that a survey was made before the deed was executed to the defendant, at which representatives of the defendant were present, and that on this survey Harold Johnson stated that the Ray line ran along the ridge from Celo to Grassy Knob. The defendant excepted.

Also that there was a continuous ridge, although called by different names, from Jumping Off Place to Celo, and then to Grassy Knob; that most of the large timber had been cut along the ridge, but that between Jumping Off Place and Celo there were three marked trees, a cherry, a locust, and a birch; that Bowlin's Creek had three principal prongs, and that while the right-hand prong was at Grassy Knob, the headwaters of the other prongs were near Celo, and that it was necessary to run to Celo to include the headwaters of Bowlin's Creek.

The plaintiffs also introduced the record of a former action between R. B. Johnson and G. D. Ray, which was tried in McDowell County and taken by appeal to the Supreme Court, and is reported in 72 N. C., 273, *Pearson, C. J.*, writing the opinion, relying upon the record as an estoppel and insisting that if it is not an estoppel the opinion of the Court is a judicial construction that the line in controversy must run as they contend.

The defendant excepted "to the court permitting, over defendant's objection, plaintiffs' counsel, in argument to jury, to tell the jury that the line in dispute had been passed upon and settled by the Supreme Court in *Johnson v. Ray,* reported in 72 N. C. 273, by one of the most illustrious judges who ever adorned the bench of any court in the world, and to read that opinion and to argue that the line was fixed to run up to top of Step Rock Ridge to Celo, and then along the top of Grassy Knob to James Ray's line at Grassy Knob, at the right-hand fork of Bowlin's Creek."

The court charged the jury that the record in the former action was not an estoppel, as no final judgment had been introduced, and instructed the jury to answer the fifth issue "No."

There are several exceptions to the statement of the contentions of the parties in the charge, but these depend on the admissibility of the evidence objected to.

(432) The defendant also excepted to the refusal of his Honor to remove the action from Yancy County, contending that it could not have a fair trial in that county on account of the wide and influential connections of the plaintiffs.

The location of the line was submitted to the jury as an issue of fact, and his Honor instructed the jury that they could not depart from a "southwesterly course" from Jumping Off Place, except in so far as it was necessary to include the headwaters of Bowlin's Creek.

The jury returned the following verdict:

1. Where is the line which is called for in the description in the complaint after reaching the "Jumping Off Place" at the head of Ailer's Creek as follows, "Then a southwesterly course along the various windings so as to include all the headwaters of Bowlin's Creek to James Ray's line at Grassy Knob at the right-hand fork of Bowlin's Creeks"? A. With the main height of the ridge to Celo; thence the main height of the ridge to Grassy Knob.

2. Are the plaintiffs the owners of the land described in the complaint or any part thereof? A. Yes.

3. Has defendant trespassed upon the lands of plaintiffs, as alleged? A. Yes.

4. What damage, if any, are plaintiffs entitled to recover of defendant? A. None.

5. Is defendant estopped from claiming title to the lands in dispute by the judgment in *Johnson v. Ray,* as alleged in the complaint? A. No.

Judgment was entered upon the verdict in favor of the plaintiffs and the defendant appealed.

A. Hall Johnston, Charles Hutchins, J. Bis Ray, and Hudgins, & Watson for plaintiffs.

Pless & Winborne for defendant.

ALLEN, J., after stating the case: The report of the former action between R. B. Johnson, under whom the defendant claims, and G. D. Ray, under whom the plaintiffs claim, contained in *Johnson v. Ray,* 72 N. C., 273, indicates very clearly that the location of the line now in controversy was then established by judgment in favor of the contention of the plaintiffs in this action, but we will not rest our decision upon this ground, as the issues and judgment are not before us, and if no weight is given to the proceedings in the former action, either as an estoppel or as a judicial construction, determining the location of the line as matter of law, the evidence is fully sufficient to sustain the verdict, and the line has been located correctly and in accordance with law.

It is probable there would be no controversy between the parties but for the course in the disputed call from Jumping Off Place being "southwesterly," which, by an approximately straight line, would (433) go to Grassy Knob, leaving the land in controversy outside of the plaintiffs' boundaries, while the line as contended for by the plaintiffs

runs, first, a southeasterly course to Celo, and then westwardly to Grassy Knob; but while the course given in a description is important and frequently controlling, as was said by *Battle, J.*, in *Cooper v. White,* 46 N. C., 390: "It is now well settled that a mistake in the course and distance contained in the calls of a deed shall not be permitted to disappoint the intent of the parties, if that intent appear, and if the means of correcting the mistake are furnished, either by a more certain description in the same deed or by reference to another deed containing a more certain description. *Campbell v. McArthur,* 9 N. C., 33; *Ritter v. Barrett,* 20 N. C., 266."

The principle was first declared in *Person v. Rountree,* 2 N. C., 378, and has been followed in numerous cases, including *Houser v. Belton,* 32 N. C., 358; *Mizell v. Simmons,* 79 N. C., 191; *Powers v. Baker,* 152 N. C., 719.

In *Houser v. Belton,* supra, the description in the deed under which the plaintiff claimed was "Beginning at a white oak on the *east side of Loven's Creek;* thence south 55 chains to a post oak; thence east 100 chains to a white oak; thence north 55 chains to a white oak; thence to the beginning, containing 550 acres," and the plaintiff was permitted to prove that the white oak was on the west side of the creek, the court saying, "The question is simply whether a party is at liberty to show, by the kind of proof offered in this case, that there was a mistake in using the word *'east,'* instead of the word *'west.'* It is not a question between a marked tree and a natural boundary, but between a marked tree and a mere *word.* When a creek is called for as a boundary, it will control course and distance, and even marked lines and corners, because it is permanent and fixed, and a thing about which there can be no mistake. It is a natural boundary. Marked lines and corners control course and distance, because a mistake is less apt to be committed in reference to the former than the latter. Indeed, the latter is considered as the most uncertain kind of description, for it is very easy to make a mistake in setting down the course and distance, when transcribing from the field book or copying from the grant or some prior deed, or a mistake may occur in making the survey, by losing a stick, as to distance, or making a wrong entry as to course. For these reasons, when there is a discrepancy between course and distance and the other descriptions, the former is made to give way. All the reasons for making course give way to a natural boundary, or to the lines of another tract, or to marked lines and corners, apply with full force to the present question. The deed describes the beginning corner as being on
(434) the east side of the creek; the proof shows the corner tree to be on the west side. The marked tree must control, because there is less liability to mistake about it than in the use of one word for another,

and the discrepancy shows there must be a mistake in the one or the other."

If, then, the course given from Jumping Off Place "southwesterly" is not determinative, and if, notwithstanding this call, it was permissible for the plaintiffs to prove the true location of the line, although along a different course, is the evidence offered for that purpose competent?

The evidence of general reputation as to the location of the line meets all the requirements of the law, which are stated in *Sullivan v. Blount,* 165 N. C., 11, to be that "(1) The reputation had its origin at a time comparatively remote, and (2) existed before the controversy, and (3) attached itself to some monument of boundary, or natural object, or is supported by evidence of occupation and acquiescence tending to give the land some fixed or definite location. *Tate v. Southard,* 8 N. C., 45; *Dobson v. Finley,* 53 N. C., 496; *Yow v. Hamilton,* 136 N. C., 357; *Hemphill v. Hemphill,* 138 N. C., 504; *Lamb v. Copeland,* 158 N. C., 138."

Some of the evidence showed the reputation to have existed for forty years, and when there was no controversy, and, if so, evidence of reputation for a shorter period was competent in corroboration (*Ricks v. Woodard,* 159 N. C., 648), and the reputation attached itself to a natural object, the top of a ridge, along a line a part of which was marked, and it was shown that R. B. Johnson, under whom the defendant claims, held possession up to this line.

The declarations of R. B. Johnson and of Harold Johnson were also properly admitted because made before they had parted with their title and against interest. *Guy v. Hall,* 7 N. C., 150; *Satterwhite v. Hicks,* 44 N. C., 107; *Headen v. Womack,* 88 N. C., 468; *MaGee v. Blankenship,* 95 N. C., 563; *Ellis v. Harris,* 106 N. C., 395; *Shaffer v. Gaynor,* 117 N. C., 15.

The Court said, in the first of these cases: "The declarations or confessions of the person making them are evidence against such person and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary is not supposed to make a statement less favorable to himself than the truth will warrant; at least there is no danger of overleaping the bounds of truth as against the party making the declarations. It is, therefore, evidence *against* him, and his subsequent purchaser stands in his situation; for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions"; and, in the last, "The declarations of parties to suits are always admissible evidence against, though not for, them. *McCrainey v. Clark,* 4 N. C., 658 (698); *McDonald v.* (435)

Carson, 95 N. C., 377; *Gidney v. Moore,* 86 N. C., 484; *Avent v. Arrington,* 105 N. C., 377.

If the declarations of Carrow would have been competent against him as plaintiff in this action, it would be competent under the general rule applicable to all classes of cases against the plaintiff, who claims through him. *May v. Gentry,* 20 N. C., 249; *Woodley v. Hassell,* 94 N. C., 157; *Braswell v. Gay,* 75 N. C., 515."

The motion to remove the action for trial to another county in the interest of justice was addressed to the discretion of the court and is not reviewable. *Garrett v. Bear,* 144 N. C., 24. Nor do we find any error in the refusal of his Honor to stop counsel in their argument to the jury. A similar question was raised and ruled against the contention of the defendant in *Horah v. Knox.,* 87 N. C., 487; but if the objection had been otherwise tenable the effect of the argument was practically destroyed by the subsequent instruction to the jury to answer the fifth issue in favor of the defendant. At the time the argument was made the proceedings in the former action were before the jury, and counsel were doing no more than exercising the right to argue the law and the fact to the jury.

We have considered the appeal without reference to the former action, but the plaintiffs may well contend that the line in controversy has been construed as matter of law to run with the ridge, because *Pearson, C. J.,* said on the former appeal in reference to the same line: "His Honor might also have charged that the general description, 'so as to exclude (in the original opinion the word is included) the headwaters of Bowlin's Creek,' made it necessary to follow the ridge." *Johnson v. Ray,* 72 N. C., 273. Three calls in the plaintiff's deed before the line reached Jumping Off Place were with the top of the ridge, and the line in dispute runs "along the various windings." Windings of what? Naturally windings of the ridge and not a straight line.

We have carefully considered the record, and find

No error.

Cited: Alsworth v. Cedar Works, 172 N. C. 20 (4f); *Curlee v. Bank,* 187 N. C. 125 (5f); *Power Co. v. Klutz,* 196 N. C. 359 (5f); *Stone v. Guion,* 222 N. C. 550 (4f).

WAYNE COUNTY DRAINAGE DISTRICT, No. 1, v. B. A. PARKS ET AL.

(Filed 15 December, 1915.)

1. Drainage Districts—Reports—Exceptions—Appeal—Bond Issues—Statutes.

Under the Drainage Act, Public Laws 1909, ch. 442, appeals are separately provided for under sec. 8, when the drainage district has been laid off, and under sec. 17, when the final act is passed upon; and where the complaining owner of land in the district has not entered an exception under either of these two sections, as the statute provides, and bonds have been duly issued on the lands of the district for drainage purposes, and thereafter application has been made by the commissioners for the issuance of additional bonds, in the further proceedings he may not be permitted to go back and change the formation of the district and the classification and assessments already made, by attacking the reports of the engineers and viewers, and withdraw a large part of his lands from the district theretofore formed.

2. Same—Purchasers with Notice.

Where the owner of land in a drainage district has duly excepted under sec. 8, ch. 442, Public Laws 1909, and again under sec. 17 of said chapter, and appealed, the purchaser of bonds issued by the district takes with notice of the rights of the complaining party so excepting, and acquires the bonds subject thereto.

3. Same—Reference—Notice—Invalid—Reports.

Where the complaining party has duly excepted and appealed from the manner of forming a drainage district under ch. 442, Public Laws 1909, and from the assessments made thereunder, and, with the consent of the parties, the court has referred the controverted matter to three referees, one each to be selected by the parties, and the other by the referees selected, a report made by two of them without notifying the other, and in his absence, is not valid, though the reference provides that the report of any two of them should be so, the intent of such provision being that the third be notified, and should he fail or refuse to attend, the others may not be prohibited from making it.

4. Reference—Findings—Evidence—Confirmation of Reports—Consideration by Court—Appeal and Error.

Findings of fact by the referee of the court, supported by evidence, when the report and evidence have been considered by the judge and confirmed, are not reviewable on appeal; and exceptions that the court had not given proper consideration to the report are untenable, it appearing from the judgment that the judge had done so.

5. Drainage District—Reports—Exceptions — Appealable Matters — Statutes.

Sec. 17, ch. 442, Public Laws 1909, providing for an appeal upon exception to the final report by an owner of lands in a drainage district laid off under the provisions of the statute necessarily refers to the formation of the district and the assessments of the lands embraced in it.

6. Reference—Scope of Inquiry—Drainage Districts—Conformation and Assessments—Exceptions—Appeal and Error.

Where, by consent of the parties to an action, the court has ordered a reference for hearing and determining "all matters in controversy," and the controversy has arisen upon exceptions taken by a landowner to the final report on the plan and assessments made in forming a drainage district (ch. 442, Public Laws 1909, sec. 17), the complaining party may not successfully except to the authority of the referee in passing upon questions therein arising which have been referred to them.

(436) APPEAL by plaintiffs from *Bond, J.*, at May Term, 1915, of WAYNE.

Special proceeding before the clerk, which was removed to the Superior Court of Wayne, at term, by appeal and order of the clerk, and there heard on exceptions of the plaintiff.

This is a proceeding to establish a drainage district in Wayne County, to be known as No. 1. It seems from the record that the proceedings for that purpose instituted before the clerk were regularly con-
(437) ducted. The preliminary report under Public Laws 1909, ch. 442, secs. 3, 4, 5, and 6, was filed and considered by the clerk, and the report establishing the district and fixing its boundaries was, after due notice to the parties, confirmed on 26 October, 1911, and, as required by the statute, the matter was recommitted to the engineer and viewers who made the report, for the purpose of having a complete survey of the district, with maps and plans prepared by them and filed with the clerk. This final report was returned and filed on 20 December, 1911, and the same was ordered to be heard on 18 January, 1912, after due notice to the parties, which was given. No exceptions were filed to the confirmation of the preliminary report, nor was any appeal taken therefrom, under sec. 8 of the act, nor was there any exception to the confirmation of the final report or any appeal therefrom by J. W. Bizzell, and none at all, except by J. S. Wooten, Mrs. Daisy Smith, Mrs. E. W. Sanderlin, and Mrs. Henrietta Wooten, who filed formal written exceptions and appealed from the order of the clerk to the Superior Court at term for a trial by jury. When the preliminary report was confirmed and a further report ordered, for the purposes indicated in the statute, and when commissioners were duly appointed and the final report confirmed, the first installment of bonds to defray the cost of the drainage scheme were issued to the amount of $23,489.30, the sum of $2,810.70 having been paid in by certain landowners. It was afterwards found that this was not sufficient and the plaintiff applied, by petition, to the clerk, for an additional issue of $6,575, which was ordered by the clerk.

J. W. Bizzell answered the petition and amended petition, and in his answer he objected to the classification in the final report of the engineer

and viewers, and asked that the number of acres of his land included in the formation of the district be reduced from fifty-five and four-tenths to thirty-four acres, the latter being the number of acres really embraced by the boundaries of the district. He also alleged a great disproportion between the assessment upon his land and the benefit derived from the drainage. The clerk reduced his land thereby to thirty-two and one-half acres.

J. S. Wooten and others above named also filed an answer to the petition for an additional issue of bonds.

The petitioners excepted to the order of the clerk in regard to the reduction in acreage of J. W. Bizzell's land, and to the allowance of an answer by J. S. Wooten and others, and the whole matter was taken before the Superior Court by appeal, and, coming on to be heard there, the cause was referred, by consent of the parties, to W. D. Grant, Fred S. Isler and J. K. Warner (Henry A. Grady afterwards substituted for him), for the trial and determination of all the matters in controversy. The referees filed their report changing the classification as to the lands of Mrs. E. W. Sanderlin and Mrs. Kate Wooten and directing a reassessment, and also the issue of the additional bonds for (438) $6,575 as asked for by the plaintiff, in affirmance of the clerk's action. They overruled the exception of plaintiff to the order of the clerk in respect to the J. W. Bizzell land, and they tendered a judgment in conformity with their findings of fact and conclusions of law. The plaintiff filed several exceptions to this report, from which the referee W. D. Grant had dissented by a formal report of his own, and the entire matter, orders of the clerk, report of referees and exceptions thereto, came on to be finally heard before Hon. W. M. Bond, judge presiding, at May Term, 1915, when "It was admitted in open court by the attorneys of plaintiff that there was ample evidence before the referees to sustain their report." The case having been fully argued and duly considered by the court, it was adjudged that all of the exceptions be overruled, and the judgment of the clerk and the report of the referees were in all respects approved and confirmed, and judgment was accordingly entered and the costs and allowances taxed as therein provided. Plaintiffs excepted and appealed to this Court.

Dortch & Barham, W. W. Pierce, Guion & Guion for plaintiff.
W. S. O'B. Robinson, Rouse & Land for Wooten and others.
Langston, Allen & Taylor for defendant Bizzell.

WALKER, J., after stating the case: The statutes under which this proceeding was brought and conducted to final judgment seem to provide for an appeal at two stages thereof, one, under Public Laws of

1909, ch. 442, sec. 8, when the drainage district has been laid off, and another, under sec. 17, when the time for an adjudication upon the final report of the viewers has arrived. J. W. Bizzell did not appear and except to either of these reports, the preliminary or the final, and the court, therefore, erred in allowing him to do so upon the application of the plaintiff for an additional issue of bonds. He could except then and be heard only as to any matters involved in the petition for the additional issue of bonds which affected his interests, but he cannot be permitted to go back of this and change the formation of the district and the classification and assessments already made, by attacking the reports of the engineer and viewers, and withdrawing a large part of his land from the district, especially after bonds had been issued on the basis of those reports and their confirmation, and sold to innocent holders. It would be unjust to them, if not illegal, as it would greatly impair their security, there being nothing substituted for the land thus taken out of the district, to preserve the value of that security. *Broadfoot v. Fayetteville,* 124 N. C., 478; *McCless v. Meekins,* 117 N. C., 35. But whether or no the bondholders could object, if they were parties, upon the ground that their rights would be, in a legal sense, impaired, it is sufficient to say that it would be unjust to them, and there is (439) nothing in the statutes which allows an exception as to matters already settled at such a late stage in the proceedings. This view is sustained by the following decisions on similar statutes: *Zeigler v. Gilliatt,* 105 N. E., 707; *Trigger v. Drainage District,* 193 Ill., 230; *Hatcher v. Supervisors,* 145 N. W., 12; *Allen v. Drainage District,* 64 So., 418.

Exceptions and appeals are provided for in the statutes, and the time fixed when they must be noted. As J. W. Bizzell did not appear and except at that time, it must be assumed that he was satisfied with what had been done, and waived his right. He can file exceptions to any action taken in regard to the additional issue of bonds, but not to the former proceedings, which are past and closed as to him. There was error, therefore, in allowing him to answer and except as he did. This ruling, though, does not apply to J. S. Wooten and associates, as they excepted when the final report was filed and appealed under sec. 17 of the statute, which was allowable thereunder as that section is construed in *Shelton v. White,* 163 N. C., 90. The first bonds were issued after the exceptions were filed and the appeal taken, and, therefore, they were purchased with full knowledge of the rights of these parties in the further progress of the case. The latter, for this reason, were entitled to be heard, as they had excepted and appealed and properly reserved their rights from time to time.

But we think there was error in confirming the report of the referees without first passing upon the serious question of fact as to whether there has been any legal report from them. One of the referees, W. D. Grant, filed what is called a "minority report," in which he agrees with some of the findings of his other two associates, and dissents from others, and then states that the referees met and examined the premises, and, after hearing and considering the evidence, they failed to agree, no two of them being able to do so, and that then they adjourned with the understanding that they would meet again for further discussion of the matters and try to reach a decision, but no such meeting was ever held, and he knew nothing of any meeting, if there was such, or of any agreement between the other two referees, until a report they had already signed was presented to him by one of them, and he refused his assent to it and did not sign it. If this be true—and the court should have ascertained and decided whether or no it was true—there was no valid report made by the referees. The law contemplates that they shall deliberate together and as a body, and not that two of them shall do so, apart from the third one, and this is what is required by the terms of the consent order of reference, as we construe it, the cause having been "referred to the aforesaid *three* referees for trial and determination according to law."

It is true that there is provision in the order of reference that J. K. Warren (whose place was taken by Mr. Grady with the same powers) and either one of the other referees might proceed to (440) hear and determine the cause in the absence of the third referee; but we think it perfectly clear that what was intended, and what is expressed in this clause, is that the referees should have notice of any proposed meeting, and if any one of them, other than Mr. Warren or Mr. Grady, failed to come, the remaining two could proceed to execute the order without him. This was done to prevent any one of the referees from defeating the object of the reference by willfully absenting himself after receiving notice of a meeting. It could not mean that two of the referees might ignore the third and take the matter into their own hands. This would be an unwarranted construction of the order, as the reference was to "all three of them." If it is construed as we have indicated it would be a reasonable provision, but if given the other meaning it would be very unreasonable, and the reference would practically be only to two of them. We cannot think that the court and the parties intended to give this arbitrary discretion to two of the referees. It is to be borne in mind, also, that each of the parties selected one of the referees, and the object in doing so would be defeated if any other meaning were given to the order than the one adopted by us.

By two of them meeting together and virtually expelling the third, an obvious advantage would accrue to the party whose appointee was associated with the umpire in hearing the case and making the report. Besides, when these referees adjourned their last meeting it was done with the distinct understanding that *they* should meet again, that is, all of them, and try to decide the case, and this understanding would be disappointed if two of them were allowed to act to the exclusion of the third one. The court should, therefore, have found the facts in regard to the manner of holding the meeting of the referees, and should not have confirmed the report until this was done and it had been ascertained that the absent referee had been duly notified of the meeting and stayed away. If he was not notified and took no part in the meeting the report was an invalid act. For this reason the order of confirmation will be set aside. But it may be well to consider some other questions raised, as they may be presented again.

The exceptions to the report based on other grounds are not tenable. The two referees have found the facts upon evidence, and their findings have been approved and adopted by the court. In such a case we do not review the findings here. *Mirror Co. v. Casualty Co.,* 153 N. C., 373; *Bailey v. Hopkins,* 152 N. C., 748; *Williamson v. Bitting,* 159 N. C., 321. There is no ground for the exception that the judge did not consider the evidence and questions involved before signing the judgment, as the judgment itself states to the contrary. *Thompson v. Smith,* 156 N. C., 345, does not, therefore, apply.

(441) If the Superior Court, with the aid of a jury, or referees, appointed by consent of the parties, cannot change the final report of the viewers, we do not see why the right to except thereto and appeal to that court was given in sec. 17 of the statute. Without such a power an appeal would be nugatory. There is nothing to review by an appeal except the formation of the district and the assessment of the lands embraced within it. When an assessment roll is prepared and the final report is confirmed without any appeal therefrom the method of reclassification, as stated in the plaintiff's brief, would, of course, be the only one by which a change in the reported classification could be made. It is not to be overlooked that the terms of the order of reference were very broad and all-inclusive, submitting to the referees for hearing and determination "all matters in controversy" arising upon the exceptions, and this embraced every question that they have tried and decided. We do not understand how appellants can except to the reference of certain questions, such, for instance, as the one mentioned in their fourth exception, when they are the questions in controversy, and they consented to the reference. It was the reference of the parties, made at their request and by their consent with the sanction of the court,

and was intended to settle every disputed matter. Besides, J. S. Wooten and his copetitioners had duly excepted and appealed, and their right to raise the questions which were made by their answer to the petition was thereby preserved, and it will be found on a comparison of their exceptions with their answers that they practically present the same questions, except as the answer refers to other questions germane only to the application for an issue of additional bonds.

The referees found the facts against the appellants, it being admitted that there was evidence to support those findings, and the judgment would naturally follow from them, if the report is found to be a valid one.

After a careful review of the entire record we have reached the conclusion that there was error as to the J. W. Bizzell matter, except in the particular we have stated, and his right to be heard should be confined to the application for a second issue of bonds. There was also error in confirming the report until the validity of the action by the two referees and of their report was first ascertained, and, on account of this error, the court below will set aside the said order and proceed to determine upon the validity of the report, and thereafter further proceed agreeably to law.

Error.

Cited: In re Inheritance Tax, 172 N. C. 175 (4f); *Taylor v. Meadows,* 175 N. C. 373 (4g); *Mitchem v. Drainage Com.,* 182 N. C. 515, 517 (1f).

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(442)

J. T. HUNT ET AL., ADMINISTRATOR, v. THE NORTH CAROLINA RAILROAD COMPANY.

(Filed 15 December, 1915.)

1. Railroads—Public Crossings—Automobiles — Vehicles — Negligence—Repairing Tracks—Trials—Evidence—Questions of Law.

The plaintiff's intestate was killed while crossing in an automobile the defendant's railroad crossing, much used, and his administrator seeks to recover damages upon the ground that had the crossing been in a proper condition the automobile would not have been impeded, and so would have avoided being struck by a passing train, which caused the injury. The evidence showed that defendant's employees had been repairing a bad condition of the track at this place for two or three days, had raised the track, replaced some crossties, and had filled in with cinders, which had been packed in place by defendant's employees and by passing vehicles for the time stated; and, by an experienced witness, that cinders were best for this purpose. A witness for plaintiff testified that certain other mate-

rial would have been better, but acknowledged that he was inexperienced in this class of work and was not speaking with knowledge: *Held*, the evidence was not sufficient to take the case to the jury upon the question of any negligent breach of defendant's duty in reference to the condition of the crossing, either as to the material or the manner in which it was applied.

2. Railroads—Crossings—Contributory Negligence — Stopping — Reasonable Precautions.

It is not always required that a driver of a vehicle, before endeavoring to cross a railroad track at a public crossing, should come to a stop; and where he has been struck and injured by a passing train, and it is established that he looked and listened with a proper regard to his own safety, his having attempted to cross without coming to a full stop will not, of itself, constitute such contributory negligence as will bar his right to recover damages in his action therefor.

3. Railroads—Automobiles—Vehicles—Occupants—Negligence Imputed.

Negligence on the part of the driver of an automobile will not be imputed to another occupant or passenger therein, unless such other occupant is the owner or has some kind of control over the driver; and this principle is applied in this case, where the chauffeur attempted to cross a railroad track at a public crossing, resulting in injury to another occupant of the car arising from the car being struck by a passing train.

4. Appeal and Error—Negligence—Error as to One Issue—Prejudicial Error—New Trial as to All Issues.

The plaintiff's intestate, a passenger in an automobile, was killed by a locomotive striking the car as the driver was attempting to cross the track at a public crossing. Under the evidence the court properly submitted the issue to the jury whether the defendant's engineer gave proper signals or warnings of the approaching train, but erroneously submitted for their determination the question of whether obstructions on the track caused the injury alleged: *Held*, the error committed was prejudicial to defendant and reversible, and a new trial is ordered on all of the issues.

WALKER and BROWN, JJ., concur in the result.

APPEAL by defendant from *Lyon, J.*, at January, Term, 1915, of GUILFORD.

(443) Civil action. The action was to recover damages for the alleged negligent killing of the intestate, and there was evidence on the part of plaintiff tending to show that on 3 June, 1914, intestate and others were in an automobile going to their work about seven miles west of Greensboro, and, as they were endeavoring to cross the track of defendant company at a much-frequented crossing, just beyond the city limits, they were run on by the train of defendant company, the machine crushed and intestate killed; that the car belonged to John T. Hunt, a contractor and one of employers of deceased, and was being driven or operated at the time by R. H. Stanford, a cocontractor and partner of

the owner, and, at the time of the collision, the defendant's train approached the crossing from the west at a very rapid rate of speed and without having sounded the whistle, rung the bell, or in any way given warning of the approach. It was claimed by plaintiffs that there was evidence also tending to show that the crossing at the time was in a defective condition, and that this also was a contributory and proximate cause of the injury.

Defendant denied that it was negligent in either of the respects suggested, and offered evidence tending to support its position. On the three usual issues of negligence, contributory negligence and damages, there was verdict for plaintiffs. Judgment, and defendant excepted and appealed.

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J. The question of defendant's liability on the first issue was submitted to the jury in two aspects:

1. That the train approached the crossing without adequate warning, thereby wrongfully causing the death of intestate.

2. That the crossing was in a defective condition, impeding the progress of the car, and that this was a contributing and proximate cause of the killing.

There was evidence on the part of plaintiff tending to establish the first proposition, and it was proper, therefore, to submit the issue to the jury; but on careful consideration of the record we are of opinion that there were no facts in evidence tending to establish negligent default as to second position, and, for this error, defendant is entitled to a new trial of the issues. In this respect, there was evidence tending to show that, just before the accident, one or two days, the track at this crossing having become depressed or sunk in, the section master of defendant company and his assistants had raised the track at this crossing some eight inches, put new crossties under it and filled it in with cinders, allowing this to settle overnight; they returned in the morning and filled it up again, and there had been a lot of passing over it during the day with vehicles and machines, having a tendency to pack it. This witness testified that he regarded cinders as about the best (444) thing that could be used for making a good crossing, and that he always used them for that purpose when they could be had. True, another witness testified that he thought plank or fine rock would make a better crossing, but the witness also said that he had had no experience in repairing crossings, and on perusal of the entire testimony we find no sufficient evidence to carry the question to the jury of any negligent

breach of duty on the part of the company in reference to the condition of the crossing, either as to the material or the manner in which it was applied, and there was, as stated, prejudicial error in allowing the jury to consider the case in that aspect.

And it was proper, also, to submit to the jury the question of contributory negligence on the part of the intestate. There was evidence tending to show that the driver of the automobile looked and listened before entering on the crossing, and it is held with us that it is not always, and as a matter of law, required that a vehicle should come to a stop before endeavoring to cross. *Shepard v. R. R.,* 166 N. C., 539, and *Elkin v. R. R.,* 86 S. E., 762.

Furthermore, it is held by the great weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this State. See a learned opinion on the subject by *Associate Justice Douglas* in *Duval v. R. R.,* 134 N. C., 331, citing *Crampton v. Ivie,* 126 N. C., 894, both of these decisions being approved in the more recent case of *Baker v. R. R.,* 144 N. C., 37-44. And see, also, a valuable article on the subject in 2 Ruling Case Law, secs. 42 and 43, in which the position is also stated with approval, and *Non v. R. R.,* 232 Ill., 378. There is nothing in the case of *Bagwell v. R. R.,* 167 N. C., 611, that in anyway militates against this position. On the contrary, the principle announced in *Crampton v. Ivie* is there expressly approved, and the verdict and judgment in favor of the railroad was sustained on the ground that, under the charge of the court, the jury had necessarily negatived any negligence on the part of the defendant.

On the second issue, the case seems to have been submitted in recognition of the principle, and, on the record as it now stands, we find no error in the way the case was presented to the jury on that issue. But for the error as to the defective crossing defendant is entitled to a general new trial, and the same is ordered on all the issues.

New trial.

WALKER and BROWN, JJ., concur in the result.

Cited: Brown v. R. R., 171 N. C. 270 (2g); *Dail v. R. R.,* 176 N. C. 112 (2f); *Perry v. R. R.,* 180 N. C. 296, 297 (2f); *Parker v. R. R.,* 181 N. C. 103, 105 (3f); *Pusey v. R. R.,* 181 N. C. 142 (3f); *Tyree v. Tudor,* 183 N. C. 346 (3f); *Williams v. R. R.,* 187 N. C. 351 (3f); *S. v. Trott,* 190 N. C. 677 (3l); *Smith v. R. R.,* 200 N. C. 182 (3f); *Dillon v. Winston-Salem,* 221 N. C. 520 (3b).

(445)

J. A. LOWE, RECEIVER, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 15 December, 1915.)

1. Insurance—Indemnity—Repudiation of Liability—Notice of Suit.

Where the indemnified notifies the indemnity company of an action about to be commenced to recover damages for a wrongful death covered by the policy, and the company denies liability for the death on the ground that the employee was under the lawful age required by our statute, and therefore not within the meaning of the policy, the denial of such liability renders it unnecessary for the indemnified to comply with the terms of the policy in giving notice of the commencement of the action, so as to afford the company an opportunity to defend, and recovery may not successfully be resisted on that account.

2. Insurance—Indemnity—Loss.

It is necessary for the plaintiff to show that he has sustained the loss he seeks to recover in his action against an indemnifier against loss, and not alone that a judgment has been obtained against him for an injury to an employee covered by the bond.

3. Insurance—Indemnity—Breach—Defense of Suit — Costs — Attorney's Fees—Contracts.

Where the insurer has refused to defend an action contrary to its agreement contained in its bond indemnifying the insured against loss for the negligent injury to or death of an employee, etc., the assured, in its action on the bond, may recover the costs, including attorney's fees, he has incurred in thus being forced to defend the action.

CLARK, C. J., dissenting.

APPEAL by both parties from *Harding, J.*, at Spring Term, 1915, of AVERY.

Civil action tried upon an agreed state of facts. From the judgment rendered, plaintiff and defendant both appealed.

L. D. Lowe, W. C. Newland, S. J. Ervin for plaintiff.

Harrison Baird, Lee F. Miller for defendant.

PLAINTIFF'S APPEAL.

BROWN, J. This action is brought on an indemnity bond to recover the amount of a judgment rendered against the Bobbin Company in favor of Mary Marcus, administratrix of Harlan Marcus, for the negligent killing of her intestate, for the sum of $6,650, the limitation in the bond sued on being $5,000.

The defense is:

1. That the insured failed to forward to defendant the summons and process served on insured when the action was commenced.

2. That the contract sued on is one of indemnity against loss and not against liability, and that plaintiff has not paid the judgment.

(446) In regard to the first defense the facts are: that upon the death of the said Harlan Marcus the Linville Bobbin Company notified the defendant of the death of the said Harlan Marcus and demanded that said company comply with the terms of its contract evidenced by said policy, notifying the defendant that a suit was about to be instituted for the recovery of damages, and the said defendant disclaimed any liability under the terms of said policy, declaring as its reason for declining to recognize any liability imposed upon it under the terms of said policy that, under the statute of North Carolina, they were not liable under the terms of said policy on account of the death of said Harlan Marcus, on the ground that, as it contended, the said Harlan Marcus was under the age of fourteen years; that thereafter, when the said action was begun against the Linville Bobbin Company for the recovery of damages on account of his alleged negligent killing, the Bobbin Company gave no notice to the defendant of the institution of said action, said failure to give said notice being due to the fact that the said defendant had theretofore refused and declined to recognize any liability under the terms of said policy; that the said suit was defended by the counsel employed by J. R. Lowe, receiver of the Bobbin Company, to conduct said defense, without the aid or assistance of the defendant.

It is contended by defendant that this was not intended as a denial of all liability to the insured upon the contract, but only a denial of the liability of the insured for the death of the employee. The language of the finding does not support the contention. In our opinion the defendant denied its liability on the contract to the insured. Consequently, the insured was relieved from the duty of forwarding the process served on it.

An insurance company cannot deny all liability under a contract of insurance and then be heard to say, after it has repudiated the contract, that assured should have given it notice when the action was instituted, so that it could have defended the action in accordance with the terms of the contract. Having denied any liability under the policy, it was neither necessary nor proper to notify defendant again. Guerringer v. *Ins. Co.*, 133 N. C., 407; *Lanier v. Ins. Co.*, 142 N. C., 14, page 18; *Higson v. Ins. Co.*, 152 N. C., 206; *Jordan v. Ins. Co.*, 151 N. C., 341.

Upon the second ground of defense, we are of opinion that plaintiff is not entitled to recover the five thousand dollars. The contract does not indemnify the assured against liability, but only against actual

loss. It is admitted that the judgment has not been paid. That being so, the plaintiff has suffered no loss and cannot recover.

It is held by this and other courts that "when a contract of indemnity is clearly against loss, no action will lie in favor of the insured until some damage has been sustained, either by the payment of the whole or some part of the employee's claim." *Clark v. Bonsal,* 157 N. C., 270; *Hensley v. Furniture Co.,* 164 N. C., 151; *Finley v. Cas-* (447) *ualty Co.,* 113 Tenn., 598; *Casualty Co. v. Martin,* 163 Ky., 12.

Affirmed.

DEFENDANT'S APPEAL.

The defendant appeals because the judge rendered judgment in favor of the plaintiff, receiver, for costs, expenses and attorney's fees incurred by plaintiff in defending the Marcus suit. The plaintiff's costs, expenses and attorney's fees incurred by him in defending the suit amount to $352.95, of which he has paid $140.

The contract makes it the duty of defendant, at its expense, "to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, through the assured's negligence, by the persons described in subsections *a* and *b* of the preceding paragraph, at the places and under the circumstances therein described, and as the result of an accident occurring while this policy is in force."

The failure of the defendant to defend the suit, after repudiating its liability to the assured, constituted a distinct breach of contract and justified the plaintiff in defending it at his own expense. *Beef Co. v. Casualty Co.,* 201 U. S., 173.

These costs and expenses constitute a primary liability of defendant that plaintiff may recover as damages for the breach of the contract. *Power Co. v. Casualty Co.,* 153 N. C., 279.

Affirmed.

CLARK, C. J., dissenting: The defendant company executed an indemnity to the Linville Bobbin Company for any "loss" that it might incur by reason of injury or death of any of its employees. To pay for this indemnity policy, said Bobbin Company took out of the fund which would have been liable to the payment of injuries sustained by its employees a sum which in course of time would more than equal such losses, else indemnity companies could not prosper.

Upon the death of the employee, who, in this instance, was killed in the course of employment, the Casualty Company became liable for the amount thereof. It cannot matter that such amount was not ascertained

before this action was brought. Indeed, it is brought to ascertain that amount. If the Bobbin Company had collected that amount from the defendant the fund in its hands ought to be applied to such loss. It can make no difference that the Bobbin Company has become insolvent. This cannot excuse the defendant, or release its liability in any way, nor deprive the personal representative of the deceased of a right to receive said sum.

(448) The contract to indemnify against "loss" should not receive this restricted construction. If it does, then the Indemnity Company has received money for which it is to pay nothing in return, though the employee has been wrongfully killed. The word "loss" in the due and proper construction of the contract means "liability accruing by reason of the death or injury of any employee"—the liability not to exceed the sum specified.

It is a principle of law well recognized that when the principal debtor obtains security the creditor is subrogated to the right to subject such security to the payment of the liability. Here the personal representative of the deceased is entitled to be subrogated to the indemnity which was purchased by the Bobbin Company for payment of the losses, i.e., the liability occurring by reason of the wrongful death or injury of any employee. This is independent of any right to apply the principle laid down in *Gorrell v. Water Co.*, 124 N. C., 328, that when a contract is made between two parties the beneficiary is entitled to maintain an action therefor. *Morton v. Water Co.*, 168 N. C., 582.

The action is properly by the receiver of the Bobbin Company, who would hold the fund, if recovered, in trust for the administrator of the deceased employee. If this be not so, then the defendant, as to the insolvent employer, is like Mark Antony, "Though it had no hand in his death, will profit by his dying."

Cited: R. R. v. Guarantee Corp., 175 N. C. 570 (2j); *Mercantile Co. v. Insurance Co.*, 176 N. C. 545 (1f); *Newton v. Seeley*, 177 N. C. 530 (2f); *Taylor v. Ins. Co.*, 202 N. C. 660 (1f); *Misskelley v. Ins. Co.*, 205 N. C. 505 (1f); *Ins. Co. v. Harrison-Wright Co.*, 207 N. C. 672 (3f); *Anderson v. Ins. Co.*, 211 N. C. 26 (1g); *Boney, Ins. Comr. v. Ins. Co.*, 213 N. C. 477 (2d); *Cab Co. v. Casualty Co.*, 219 N. C. 796 (3f); *Coach Co., v. Coach Co.*, 229 N. C. 536 (3d).

CLARENCE EDWARDS ET AL. *v.* COMMISSIONERS OF GREENE COUNTY.

(Filed 15 December, 1915.)

1. County Commissioners — Injunction — Discretionary Powers — Public Roads—Courts—Statutes.

The laying out and maintenance of the public roads or highways of a county are matters left largely within the discretion of the county commissioners, and, in the absence of express legislation to the contrary, they are not to be controlled by a vote of the localities affected, either informal or otherwise; and where it is shown that they have officially dealt with a question largely submitted to their judgment, their action may not be controlled or interfered with by the courts, unless it is established that there has been a gross or manifest abuse of their discretion, or it is made clearly to appear that they have not acted for the public interest, but in promotion of personal or private ends.

2. Same—Township Bonds—Improper Use—General Averment.

Where the county commissioners have acted within the powers conferred on them by ch. 122, Public Laws 1913, establishing a scheme for the laying out, establishing and maintenance, etc., of roads for the different townships therein, and have accordingly issued bonds and expended most of the money on the township roads, they may not be enjoined at the suit of the taxpayer from laying out and constructing an additional road, with the use of the money remaining on hand from the sale of the bonds, upon allegation, as to this particular road, that it was not for the public convenience, or that the majority of the voters were not in favor of it; and general allegation, without specific averment, that the commissioners were not acting for the public good, but for their own individual advantage, is insufficient to warrant the interference of the courts.

3. Same—Notice to Landowners—Suit by Taxpayers.

The county commissioners will not be enjoined from building a public road in a township of a county from the proceeds of the sale of bonds issued by virtue of ch. 122, Public Laws 1913, at the suit of taxpayers, because notice had not been given to landowners along the route proposed required by Revisal, secs. 2684, 2685; for these statutes were enacted for the benefit of individual landowners, whose rights as such are not involved in a suit of this character.

APPEAL by plaintiff from order dissolving restraining order by (449) *Bond, J.*, heard at chambers 19 October, 1915; from BEAUFORT.

Civil action, heard on motion to dissolve a preliminary restraining order. The action was to restrain the defendant commissioners from spending certain moneys held by them, part of the proceeds of a bond issue for laying out, etc., the roads of a township, pursuant to ch. 122, Laws 1913. On considering the affidavits offered for and against the motion, the court entered judgment that the restraining order be dissolved, the plaintiff excepted and appealed.

Y. T. Ormond and J. Paul Frizzelle for plaintiff.
L. I. Moore and J. A. Albritton for defendant.

HOKE, J. Chapter 122, Public Laws 1913, establishes a scheme by which the roads of the different townships may be "laid out, established, repaired, graded, constructed and improved in any way," and provides for a bond issue for the purpose when authorized by a vote of the people of the locality affected; sec. 1 of the act providing, among other things, "That the bonds so issued by the commissioners of the county shall be paid by the township for which they are issued and shall not be chargeable against any property or polls outside of said township. The board of county commissioners, in performing the duties of issuing, selling and purchasing bonds or doing any other thing under this act, shall be deemed the agent of any township acting under this act."

On the hearing it was made to appear that, pursuant to this statute, there had been a bond issue of $20,000 for the purposes designated in Ormonds Township, Greene County, and the commissioners having expended a large part of the proceeds in the improvement of the township roads, had remaining in their hands near the sum of $1,200, and with this sum they were about to construct a new road taking a designated route in the township, when plaintiffs instituted the present action to restrain the commissioners from their purpose, under allegations
(450) made on oath, chiefly, that the new road was not needed and would not be for the public interest and benefit of the people of the township; that it was contrary to the will of the large majority of the citizens resident therein, and "third, that, as plaintiffs are informed and believe, the commissioners in laying out and constructing said road are deliberately and willfully disregarding their duties as public officers and violating the trust and confidence reposed in them, in utter disregard of the expressed will of the citizens and taxpayers of the township and for the purpose of promoting their own selfish and private interests and the interests of two or three landowners."

It was further averred that, in laying out the proposed road, the commissioners had not pursued the course indicated and required by secs. 2684 and 2685 of Revisal, requiring that landowners along the route should be notified. In support of the allegation that the proposed road was against the will of the people of the township, it was alleged in one of plaintiff's affidavits that, on an informal vote had on the question, there were 101 votes polled, and all of them, practically the entire voting strength of the township, were cast against the proposed road.

On the part of the defendants there was full and detailed denial of all the facts tending to show that the road was an improper undertaking, and of any and all allegations in impeachment of the motives of the

commissioners; that, for various and sufficient reasons, specified in detail, the proposed road was necessary to the public interests of the township, giving them an outlet in times of high water across the low grounds of Contentnea Creek, which did not now exist and of which there was a great public need; that the matter had aroused great interest in the county and township and the commissioners had carefully looked over the routes and had caused the same to be surveyed and designated by a competent road surveyor, and that the route selected was by far the best way available to meet the desired need, and the same could be constructed and maintained at far less expense than any other suggested.

In reply to the alleged opinion of the township on the subject, the commissioners aver that the vote was not taken so as to give any intelligent or fair expression of the people, and, on the contrary, at a meeting of the board, after full discussion, and with a large attendance of persons interested, when it was announced that the proposed route would be selected, and objections and criticisms were called for, none were made, etc., and that the road meets a great need in the township and can be built and maintained within their means. On this, the evidence chiefly relevant, we are of opinion that his Honor made a correct decision in dissolving the restraining order.

Under our Constitution, and under the present statute more directly involved, the government of the county is vested to a great extent in the board of county commissioners. *Wilson v. Holding, ante,* (451) 352; *Board of Education v. Comrs.,* 150 N. C., 116. In the exercise of their powers and in the absence of express legislative direction to the contrary, they are not to be controlled by a vote of the localities affected, either informal or otherwise, and, whenever it is shown that they have officially dealt with a question lawfully submitted to their judgment, their action may not be controlled nor interfered with by the courts unless it is established that there has been a gross and manifest abuse of their discretion or it is clearly made to appear that they have acted, not for the public interest, but in promotion of personal or private ends. *Supervisors v. Comrs.,* 169 N. C., 548, 86 S. E., 520; *Comrs. v. Comrs.,* 165 N. C., 632; *Newton v. School Committee,* 158 N. C., 116; *Brodnax v. Groom,* 64 N. C., 244.

On this question, in the *Newton case, supra,* it was held: "The courts may not interfere with discretionary powers conferred on school committees in their administrations unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of the discretion conferred."

In *Supervisors v. Comrs. supra,* the *Chief Justice,* delivering the opinion, states the position as follows: "Courts can interfere in the

purely administrative matter of which roads shall be repaired with public funds only when the administrative officials, to which the decision has been entrusted, indulge in such fraud or malversation as would call for indictment, or attempt such fraud as to clearly require that their future action be controlled to prevent the misappropriation of public funds for private purposes."

In this last case, which is more directly relevant and controlling on most of the questions presented, it was further held: "Under the Constitution and Sess. Laws 1905, ch. 714, entitled 'An act for the betterment of public roads of Pitt County,' the county commissioners are vested with the control of the county roads of such county, and, although the statute authorizes them to levy a special tax upon the property of each township annually, the fund to be collected to be used solely for the improvement of roads in the townships where it is collected, such provision does not deprive the county commissioners in favor of the township supervisors of roads of the power to determine which road, or what roads, in any given township from which a fund had been raised, shall be worked."

We were referred, on the argument, to *Stratford v. Greensboro,* 124 N. C., 127, in support of the position that, on the present record, the action of the commissioners could well be made the subject of judicial scrutiny and control, but in that case there was specific allegation with evidence tending to show that the action of the city authorities
(452) was in pursuance of a contract admittedly entered into with the individual defendant and making it, according to plaintiff's evidence, not at all improbable that the measure complained of was in promotion of a personal and private scheme, in favor of the individual defendant and not in furtherance of the public interests. In that case the allegations were specific and definite of issuable facts tending to establish official default, and bear very little resemblance to the allegations appearing in the present appeal. Here they are in such general terms that they hardly amount to a charge of misconduct; certainly they present nothing specific or definite tending to support the general averment, and are entirely insufficient to justify an interference with the official discretion vested in the defendants by law.

It was further insisted that, in laying out the proposed road, the requirements of Revisal, contained in secs. 2684, 2685, have not been complied with. Those sections were enacted in protection of the individual landowner along the route of the proposed road entitled to notice, and, so far as we can see, are not involved in the present appeal. This is a proceeding at the instance of plaintiffs as taxpayers, challenging the power of the county commissioners to act in the premises, and on the ground chiefly that they are not observing the will of the town-

ship voters; and we do not find in the record any allegations or evidence tending to show that the rights or privileges of individual landowners, as such, are in any way imposed upon or threatened.

There is no error, and the judgment of his Honor is

Affirmed.

Cited: Cobb v. R. R., 172 N. C. 61 (1g, 2g); *Comrs. v. State Treasurer*, 174 N. C. 147 (2d); *Comrs. v. Boring*, 175 N. C. 112 (2d); *Allen v. Reidsville*, 178 N. C. 532 (1j, 2j); *Peters v. Highway Com.*, 184 N. C. 32 (1f, 2f); *Cotton Mills v. Comrs.*, 184 N. C. 229 (1f, 2f); *Hartsfield v. New Bern*, 186 N. C. 142 (1f, 2f); *Parks v. Comrs.*, 186 N. C. 498 (1g, 2g); *Newton v. Highway Com.*, 192 N. C. 63 (1j, 2j); *Reed v. Highway Com.*, 209 N. C. 653 (1g, 2g).

E. G. GILMER ET AL. v. FRANKLIN PARK IMPROVEMENT COMPANY.

(Filed 15 December, 1915.)

1. Contracts—Parol Guaranty—Statute of Frauds.

The plaintiff leased a hotel from the owner, a corporation, with the privilege of purchase. Default being made, the property was sold. The plaintiff seeks, in his action, to hold the defendant liable on his oral statement that he and another were the owners of 95 per cent of the stock, and that he, the plaintiff, would not be interfered with, etc.: *Held*, the guarantee was void under the statute of frauds, Revisal, 974.

2. Contracts of Sale—Breach—Verdict—Damages—Appeal and Error.

The defendant corporation contracted to sell its hotel to the plaintiff, but was prevented from doing so by default and foreclosure of the mortgage: *Held*, under the circumstances of this case, the verdict of the jury, under the conflicting evidence, undisturbed by the trial judge, was conclusive on the amount stated.

APPEAL by both parties from *Shaw, J.*, at April Term, 1915, of CABARRUS.

The plaintiffs, on 29 March, 1912, leased the hotel property at (453) Brevard, N. C., from the defendant company for one year with the privilege of renewal for two years. At the same time the defendant company gave the plaintiff an option to purchase the property at the price of $15,000, reserving, however, the right to sell it at not less than $18,500, and in case it exercised that right to sell, it agreed to pay the plaintiff one-half the sum they might receive from the sale of the property in excess of $15,000.

At the time the contract was made there was a mortgage on the property for $8,000. It was in evidence that the plaintiff, Gilmer, expressing an unwillingness to lease the property with a mortgage on it, the defendant Robinson, president of the corporation, replied: "Me and Smith (the secretary, who was also codefendant) own 95 per cent of the stock. You will be protected and never interfered with." The defendant Robinson, the plaintiffs allege, led them to believe that the defendant corporation was insolvent, but that he and Smith were solvent and would protect the plaintiffs' lease.

The plaintiffs sublet in April, 1912, for $2,000, with the privilege of renewal for two years, and paid the stipulated rent of $1,200. In August, 1912, the defendant corporation defaulted in payment of the semiannual interest of $240. The mortgagee wrote to Robinson three times, asking if he desired the loan extended, and received no reply. The mortgagee testified that the loan would have been extended indefinitely if interest had been paid. In November, 1912, the mortgage was foreclosed. The defendants gave the plaintiffs, who resided in another section of the State, and the hotel being closed, no notice of the sale and no opportunity to protect their rights. In August the plaintiffs had notified Robinson that they would purchase the property under their option. Defendant Smith attended the foreclosure sale and ran the property up to about $15,795, and it was then bought by Cleveland & Williams for $15,800 cash.

The plaintiffs brought this action and joined the defendants, Smith and Robinson, as guarantors from loss or damage on account of the breach of contract. The plaintiff entered a nonsuit as against Smith. The jury, on the issues submitted by the court, found that "The defendant, the Franklin Park Improvement Company, procured the sale of the property described in the complaint in violation of their contract, as alleged in the complaint, and that the plaintiffs were entitled to recover of said company for breach of said contract $1,750," and from the judgment thereon the defendants appealed.

The court, being of opinion that the defendant Robinson was not liable on his verbal guarantee, directed the jury not to answer the issues as to his liability. To this the plaintiffs excepted and appealed.

(454) *John W. Hutchinson and R. D. Gilmer for plaintiffs.*

Duckworth & Smith, L. T. Hartsell and Thaddeus A. Adams for defendants.

CLARK, C. J. This case was fully and ably argued by counsel on both sides, who also filed very elaborate briefs, showing their interest in the

cause and the study which they had given it. But upon consideration of the whole case we do not find any error.

The first issue was purely as to a matter of fact, and, there being evidence to support the plaintiffs' contention, the verdict, undisturbed by the judge, is conclusive. It follows that, as to the second issue, $1,750 was the correct amount of the damage.

The judge was also correct as to his ruling that under the statute of frauds, Rev., 974, the guarantee of Robinson, if made, was oral, and therefore could not be enforced.

No error.

WALKER, J., dissents in part.

Cited: Caldwell v. Robinson, 179 N. C. 521, 525 (p); *Novelty Co. v. Andrews,* 188 N. C. 64 (1f).

J. L. HEMPHILL & COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 15 December, 1915.)

1. Carriers of Goods—Corporation Commission — Regulations — Written Notice to Consignee—Waiver.

The regulation of the Corporation Commission requiring that the carrier mail written notice upon arrival of a shipment may be waived by the conduct of the consignee, as, in this case, where his managing agent and a drayman, customarily hauling his goods from the depot, were both notified of their arrival, and the former, stating that he did not then need the goods, left them in the depot warehouse awaiting a bill of lading for them.

2. Carriers of Goods—Notice to Consignee—Warehousemen—Negligence—Instructions—Reversible Error.

Where a railroad depot warehouse is destroyed by fire, causing the loss of a shipment of goods left in the warehouse after notice of arrival to the consignee, and for the consignee's convenience, the latter, in order to recover in his action, must show by a preponderance of evidence that the defendant was guilty of negligence which was the proximate cause of the injury, and a charge of the court that puts upon the carrier the burden of an insurer, in such instances, and not of a warehouseman, is reversible error.

APPEAL by defendant from *Harding, J.,* at March Term, 1915, of WILKES.

Civil action tried upon these issues:

1. Is defendant indebted to plaintiff by reason of loss of goods or failure to deliver said goods, as alleged by plaintiff? If so, in what (455) amount? A. Yes, $138.04, with interest from date claim was filed, 7 January, 1914.

2. Had 90 days expired from the filing of the claim in this cause to the beginning of this action? A. Yes.

From the judgment rendered defendant appealed.

Hackett & Gilreath for plaintiff.

W. W. Barber for defendant.

BROWN, J. This action is brought to recover for the destruction by fire of a case of ginghams shipped to the plaintiffs. The testimony tends to prove that the goods arrived at the defendant's warehouse at North Wilkesboro on 20 December, 1913, and were destroyed by the burning of said warehouse 3 January, 1914. There was evidence tending to prove that the defendant failed to give written notice, as required by the regulations of the Corporation Commission, of the arrival of the goods, and, consequently, the same remained in its warehouse.

His Honor charged the jury that if the defendant failed to give the written notice of the arrival of the goods and failed to deliver them to the plaintiff for the reason that the waybill had not arrived, and while waiting for the waybill and holding the goods the company's station caught fire and the goods were destroyed, they should answer the first issue "Yes," and add the sum of $138.04, the value of the goods. This charge was duly excepted to.

We are of opinion that under the evidence in this case the charge was erroneous. It put upon the defendant the burden of an insurer, and not that of a warehouseman. A common carrier is an insurer up to a certain period, when its duties as a carrier end and its liability as a warehouseman begins. In order to hold the defendant liable as a warehouseman, plaintiff must show by preponderance of evidence that the defendant was guilty of some negligence, which was the proximate cause of the destruction of the goods.

The evidence tends to prove that Rufus Cundiff is the regular drayman of the plaintiff and has authority to get goods from the depot without any written order of the plaintiff, and that such has been his custom. The evidence tends to prove that verbal notice of the arrival of these goods was given to Cundiff, as well as to plaintiff's son; that the plaintiff's son, Lee Hemphill, told the defendant's agent that they had not received the bill of lading for the goods yet, and that they were not needing the goods, and, therefore, had not sent for them. The

evidence tends to prove the bill of lading was mailed 29 November and was received a few days thereafter by the plaintiff.

While the regulations of the Corporation Commission require common carriers to give written notice of the arrival of goods, yet such notice may be waived. In this case the evidence tends to prove (456) that written notice was waived by the plaintiff and manifested by the usual course of dealing between them. Defendant's agent notified plaintiff's drayman, and goods were delivered to him without any written order. In this case plaintiff's son, who seems to be a general factotum for the plaintiff, had notice of the arrival of the goods, as well as the drayman, who had authority to receive them.

We are of opinion that the same principle applies here as has been applied in *Kime v. R. R.*, 153 N. C., 400; 156 N. C., 453, and in *Jones v. R. R.*, 148 N. C., 586.

In those cases there were stipulations in bills of lading requiring the notice of a claim for damages to be given in writing to the common carrier before the live stock is removed or intermingled with other live stock. We have held that that is a reasonable stipulation and will be upheld by the courts, but that, where the carrier has actual notice at the time of the injury to the stock and the extent of it, written notice will add nothing to its information, and the reason for the rule having ceased, it would not be enforced. *Cessante ratione legis, cessat et ipsa lex.*

Upon all the evidence in this case, his Honor should have given the defendant's prayer for instructions that, in the absence of evidence of negligence, the plaintiff would not be entitled to recover.

New trial.

Cited: Lawshe v. R. R., 191 N. C. 476 (2f).

JUDSON McMAHAN v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 15 December, 1915.)

1. Easements—Remedies of Owner—Measure of Damages—Railroads—Right of Condemnation.

Where a railroad company enters upon lands by virtue of its franchise and constructs and operates its railroad thereon, the remedies for compensation available to the owner are either to petition before the clerk under the statutes governing such proceedings or to sue in the Superior Court for permanent damages, the measure thereof being the market value of the lands actually covered by the right of way, and such dam-

ages thereby caused to the remainder of the tract, deducting from the estimate the pecuniary benefits or advantages special and peculiar to the land in question; and, when such are paid, an easement will pass as in case of condemnation.

2. Contracts—Interpretation—Ambiguity—Existing Conditions.

In interpreting contracts, the intent of the parties as expressed in the entire instrument shall prevail, and where the contract is expressed in language sufficiently ambiguous to permit of construction, resort may be had in proper instances not only to the language employed, but to the nature of the instrument itself, the condition of the parties executing it, and the objects it had in view.

3. Same—Easements—Railroads—Lessor and Lessee—Measure of Damages.

A grant of a right of way for one purpose does not necessarily convey an easement for a different purpose imposing further burdens upon the land without additional compensation to the owner; and a lease of lands to a lumber plant, conferring the right to construct railroads thereon for its own purposes, will not be construed to give to the lessee the right to grant a railroad company the right to construct and operate its railroad or spur-tracks thereon, though advantageous to the lessee; and when such is done the owner has the present right of action against the railroad company for permanent damages to the land, the terms of the lease being considered as a circumstance relevant to the issue.

(457) APPEAL by plaintiff from *Long, J.*, at March Term, 1915, of YANCEY.

Proceedings instituted by plaintiff to recover damages for railroad right of way, heard on appeal from the clerk of Superior Court.

On the hearing there was evidence tending to show that plaintiff was the owner of a tract of land of twenty-five acres in said county, and that defendant company had entered on a portion of same, constructed its depot and various tracks, and was operating its road under its franchise, etc.; that the works of defendant on the property to date consisted of six different railroad tracks, a depot and station house, and, in addition thereto, the Carolina Spruce Company has constructed and is operating its own private line across and upon said land; and it was admitted by defendant: "That it has its main line of railroad on the land described in the lease, and admits that there is a spur going to a coal chute on the same land, and that it has some other branches on the land connected with the private lines of the Carolina Spruce Company, the number of which the counsel does not know, but claims they are short spur lines for outside connection, and that it has a depot on the land described in the lease."

It was further admitted that the defendant had acquired, by written assignment, the interests and privileges held by Carolina Spruce Com-

pany, under a written lease conveying to said company the said property for twenty years, with other stipulations appearing in the lease, and claimed the right to enter and construct its railroad station, etc., and operate the same under and by virtue of the terms of said lease without being amenable to damage or other claim of plaintiff.

On motion duly made, the court being of opinion that the plaintiff had no present right to recover damages, entered judgment of nonsuit, and plaintiff excepted and appealed.

Hudgins, Watson & Watson for plaintiff.

J. J. McLaughlin and Pless & Winborne for defendant.

HOKE, J., after stating the case: It having been made to appear that the defendant company has entered on plaintiff's land, constructed its road and is operating the same by virtue of its franchise, under our decisions and statutes, applicable, and so far as the remedy is concerned, it was open to plaintiff either to petition before the (458) clerk under the law governing such proceedings—the course pursued in this instance—or to sue in the Superior Court for permanent damages suffered, in which case, and on payment of same, an easement would pass as in case of condemnation. *Porter v. R. R.*, 148 N. C., 563; *Beasely v. R. R.*, 147 N. C., 363; *Beverly v. R. R.*, 145 N. C., 27; Revisal 1905, sec. 394. Our cases on the subject also hold that, in awarding damages under either procedure, the plaintiff may recover the market value of the land actually covered by the right of way, and also damages done to the remainder of the tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the land in question, but not those which are shared by the owner in common with other owners in the same vicinity. *R. R. v. Mfg. Co.*, 169 N. C., 160; *R. R. v. Armfield*, 167 N. C., 464; *R R. v. McLean*, 158 N. C., 498.

Speaking to the reason for awarding the full market value of the land actually covered by the right of way, the Court, in *McLean's case, supra*, said: "In determining this difference (that it, the value before and after the imposition of the easement), owing to the fact that the easement is perpetual in its nature, and, in all probability, likely to become permanent, and to the position just referred to: that the entire right of way may be at any time appropriated and used for railroad purposes whenever, in the judgment of the company, such use is required, it is held by the weight of authority that the damages allowed the owners, as a general rule, shall include the market value of the land actually taken," etc.

It is not claimed in the present case that any such right of way has been condemned or paid for by defendants in the present instance, but

it is contended by defendant that no damages are recoverable by reason of a lease of four acres of the property made by plaintiff to the Carolina Spruce Company, bearing date 12 March, 1912, and which said company had assigned to defendant before it entered upon the property. This instrument, after leasing to the Spruce Company the four acres in question for the term of twenty years, on payment of $50 per year, contains the following stipulations:

"The parties of the first part covenant and agree that they will willingly give possession of said house now occupied by them at any time that the parties of the second part demand same, and upon condition that the parties of the second part build for the parties of the first part a house of equal value without any cost to the parties of the first part, at some place designated by the parties of the first part on their lands near said spring in said branch.

"The party of the first part covenants and agrees that the parties of the second part shall have the right to erect buildings, railroads, tramroads, lumber yards, or anything that may be necessary in the
(459) manufacture of lumber, wood, bark, etc., and they shall have the right to remove any portion of same at any time that they may desire, or they can let same remain or any portion of same upon the lands without any damages to the party of the first part. The parties of the second part shall have the right of ingress and egress through and over the lands, and shall have the right to destroy all or any portion of the trees or said lands or anything else that may be thereon.

"The party of the second part covenants and agrees that the party of the first part shall have free use of said spring in said branch so far as their needs may require, and that said party of the second part will give the parties of the first part an outlet to the public road."

It is an accepted rule of construction here and elsewhere that the intent of the parties as expressed in the entire contract shall prevail, and that in ascertaining this intent and in agreements sufficiently ambiguous to permit of construction resort may be had "not only to the language employed, but to the nature of the instrument itself, the condition of the parties executing and the objects they had in view."

In *Merriam v. U. S.*, 107 U. S., 441, the principle is expressed as follows: "In such contracts it is a fundamental rule of construction that the courts may look to not only the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."

These rules of interpretation have been approved in a great number of cases in this State (*Spencer v. Jones*, 168 N. C., 291; *Simmons v. Groom*, 167 N. C., 271; *Triplett v. Williams*, 149 N. C., 394; *R. R. v.*

R. R., 147 N. C., 368; *Gudger v. White*, 141 N. C., 507); and, applied to the instrument in question here, we do not hesitate to hold that it was neither the purpose nor permissible construction of the lease that it passed to the lessee the right to superimpose a burden of this character on the property conveyed, but the land was leased for the restricted purposes indicated in the covenants for the work of the lessee as a manufacturer of lumber in its own specified business, and the railroads, tramways, lumber yards, etc., mentioned in the stipulations quoted, referred to such agencies only as were reasonably required for the principal purpose. It is well understood that the acquisition of a right of way for one purpose does not justify the exercise of a different and additional easement without making additional compensation therefor, and the restricted purpose of the present lease brings the rights obtained under it within the principle. *Wadsworth v. Traction Co.*, 162 N. C., 503; *Staton v. R. R.*, 147 N. C., 428; *Hodges v. Telegraph Co.*, 133 N. C., 225; *Brown v. Electric Co.*, 138 N. C., 533.

It is contended for defendant that this principle does not apply in the present case because the grantor had a lease of the property, and not merely a right of way. As we have endeavored to show, the (460) terms of this instrument, by correct interpretation, so restrict the purposes of the user that the right acquired thereunder may very well be likened to a right of way for a specified purpose. But, if defendant's position be conceded, it would not avail to protect the defendant from liability, for, at most, the lease only purports to convey the rights specified therein for twenty years, and under the principle for awarding damages for a railroad right of way where the company has entered on and appropriated property in the exercise of a *quasi*-public franchise, to wit, that they became responsible for the value of the entire property actually covered by the right of way and also damages to the remainder of the land, the rights obtained under the lease would not justify the appropriation of this property for such a purpose or protect the railroad from a present award of damages.

While we hold that defendant company is presently liable for permanent damages for the right of way appropriated by them, under the assignment offered in evidence, it appears that they have acquired and hold the rights and privileges granted to the original lessee (McAdam Landlord and Tenant, sec. 241; Taylor Landlord and Tenant, secs. 425-431; Woods Landlord and Tenant, sec. 81), and, in estimating the damages to be allowed plaintiff, the fact that he has given a lease of this character, conferring a right to build railroads, tramways, etc., for purposes and in furtherance of the Spruce Company's business, may be considered as a circumstance relevant to the issue as to the amount of damages.

For the reasons stated, we are of opinion that there was error in ordering a nonsuit, and the judgment to that effect will be set aside.

Reversed.

Cited: Richardson v. Woodruff, 178 N. C. 50 (2f); *Miller v. Green,* 183 N. C. 654 (2f); *Perry v. Surety Co.,* 190 N. C. 291 (2f); *Bank v. Supply Co.,* 226 N. C. 427 (2f); *Light Co. v. Sloan,* 227 N. C. 153 (3f).

W. M. WALKER ET AL. v. LINDEN LUMBER COMPANY.

(Filed 15 December, 1915.)

1. Receivers—Orders of Court—Waiver — Mortgages — Disbursement of Funds—Liens.

Where all parties are before the court and the receiver of an insolvent corporation has sold certain of its property subject to mortgage without objection, under the order of the court, and, likewise under the court's order, has distributed the proceeds among creditors, the mortgagee, or his assignee of the mortgage, by not excepting, waives his right to have the proceeds applied to his own debt, and he cannot have any lien on, or priority of payment out of, other funds in the receiver's hands.

2. Receivers—Mortgages—Liens—Priorities—Laborers—Statutes.

A receiver of an insolvent sawmill corporation, authorized by order of court to carry on its business, bought timber subject to a prior registered mortgage, under agreement between the parties that he should pay off the mortgage debt in certain proportions out of the proceeds of the sale of the manufactured product: *Held,* the lien given to laborers, etc., for work done, etc., within two months preceding the insolvency of the corporation (Rev., sec. 1206), and the priority under an execution of the judgment (Rev., sec. 1131), are not superior to the lien of the mortgagee, for such superiority of the laborer's lien is acquired where the corporation has given the mortgage on its property. Ch. 150, sec. 2, Laws 1913, requiring the laborer to file notice of his claim before a justice of the peace, has no application.

3. Reference—Rereferences—Scope of Inquiry—Reports—Charges.

The court has the authority to refer the referee's report, and thereunder the referee may change, correct or add to his former report.

(461) APPEAL by intervenors from *Allen, J.,* at March Term, 1915, of CUMBERLAND.

Sinclair, Dye & Ray for plaintiff and receiver.

Oates & Herring for J. S. Kent Co., claimant.

Cook & Cook for London Guaranty and Accident Insurance Co.
Q. K. Nimocks for E. A. Bill.

CLARK, C. J. The defendant Lumber Company owned a mill plant, but no timber. While engaged in cutting timber owned by other parties a receiver was appointed and took charge. The receiver, by authority of the court, purchased certain timber contiguous to the mill, including a tract of about a million feet, owned by W. M. Walker, and contracted with E. A. Bill to cut the same. The receiver was also authorized to enter into the usual selling contract for the output of the plant, and made such contract with J. S. Kent Company, who held a mortgage on the Walker timber.

The J. S. Kent Company had notice of the contract between the receiver and E. A. Bill at the time it made the contract to buy the lumber. E. A. Bill proceeded to cut the timber and shipped all the lumber manufactured under the contract with the J. S. Kent Company, except 225,681 feet, which he refused to ship because of an unpaid balance due him for work and labor done. He applied to the court for a lien against the lumber on hand to the extent of his claim. The matter was referred to H. S. Averitt, and the receiver was directed to sell the lumber and to hold the proceeds pending the further orders of the court, without prejudice to the rights, liens or priorities now exisiting against said lumber. It was then shipped on orders of J. S. Kent Company, and the net sum of $2,000 is now on hand as its proceeds.

At the time of the appointment of the receiver the J. S. Kent Company held a first mortgage on 94,550 feet of lumber, estimated by the receiver to be worth $1,276.42. This mortgage was transferred to the London Guaranty and Accident Insurance Company and the receiver was ordered to sell and hold the proceeds pending the de- (462) termination of the proper claimants entitled thereto. Later the court made orders in the cause which required the receiver to pay out the $973.64 which was realized from the sale of that lumber. This sum was thus expended within 60 days after the appointment of the receiver and several months before the assignment of the mortgage under which the Insurance Company is claiming.

The court properly held that the claim of said Insurance Company could not be transferred to and become a lien upon the fund now in court to which other parties are entitled. The fund to which the Insurance Company could look has been disbursed, and the only remedy which it had was waived by not excepting in apt time to the orders under which that fund was disbursed. Whether the Insurance Company can now follow that fund in the hands of those who received it is not before us.

The J. S. Kent Company assented to the sale of the timber by Walker to the receiver on condition that the receiver pay them as mortgagees $3 per thousand feet.

The mortgage of Walker was on the timber and was not a mortgage of the defendant Lumber Company, and, therefore, the lien of $3 per thousand feet stumpage, amounting to $677.04, is entitled to a prior payment over any and all other claims on this fund. The mortgage was executed by W. M. Walker to the claimant, J. S. Kent Company, and was duly registered several months prior to the date of the receivership. The mortgage was not executed by the defendant corporation, but by an individual on his own property, and the lien of his mortgage cannot be impaired by virtue of any claim against the corporation. Rev., 1131, which gives to judgments against corporations for labor performed and torts committed priority over prior mortgages executed by the corporation, has, therefore, no application.

Revisal, 1206, which provides that upon the insolvency of the corporation there shall be a lien in favor of laborers and workmen and all persons doing labor or service of any character in the regular employment of the company, a first and prior lien upon the assets thereof for all labor, work and services done "within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation, which lien shall be prior to all other liens that can or may be acquired upon or against such assets," is not intended to destroy the lien for such wages and services performed after the company goes into the hands of a receiver. The word "within" means "subsequent," that is, that after 60 days prior to the insolvency the laborers and workmen shall have a first lien for their wages. Otherwise it would be almost impossible for a receiver to operate the (463) plant.

Laws 1913, ch. 150, sec. 2, now Rev., 2023 *a*, gives to laborers engaged in cutting or sawing logs into lumber a prior lien upon said lumber, except as against the purchaser, for full value and without notice thereof.

It is true that this section has a proviso requiring the laborer to file his notice of such claim before a justice of the peace. We are inclined to think that this proviso would not require the filing of such notice when the company is operating under the orders of the court in the hands of a receiver. But it is unnecessary to pass on the point in view of what we have said in regard to the application of Revisal, 1206.

The judge was acting entirely within his authority and in the exercise of his discretion in rereferring the case to the refree for a fuller finding and report, and the referee was authorized to change, correct or add to his former report. *Rogers v. Lumber Co.*, 154 N. C., 109.

The costs of the appeal will be paid jointly by the Insurance Company and the J. S. Kent Company. As above modified, the judgment is Affirmed.

Cited: Humphrey v. Lumber Co., 174 N. C., 519 (2f).

LUCY O. McCURRY v. L. PURGASON AND ALFRED FREEMAN, EXECUTORS.

(Filed 15 December, 1915.)

1. Husband and Wife—Wife's Services—Implied Consent.

Before the passage of the Martin Act the husband, by his conduct, could give his implied consent that the wife should receive compensation for her services rendered to another, as where he joins in his wife's action to recover them, etc.

2. Evidence—Husband and Wife—Deceased—Transactions.

A husband is not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote.

3. Appeal and Error—Brief—Exceptions Abandoned.

Exceptions not mentioned in appellant's brief are deemed abandoned.

4. Evidence—Deceased Persons—Declarations.

In an action to recover for services rendered a deceased person before his death, testimony as to his declarations made to a witness while the deceased was trading at his store are held, under the circumstances of this case, to be objectionable as hearsay evidence.

5. Instructions—Construed as a Whole—Appeal and Error.

In an action to recover the value of personal services rendered a deceased person the judge charged the jury that the burden of proof was on the plaintiff to offer evidence "sufficient by its greater weight to satisfy them" of the truth of her allegations. Construing this excerpt with the charge in this case as a whole, no reversible error is found.

6. Limitations of Actions—Contracts—Consideration for Services—Board—Wills—Devises—Implied Promise.

In an action to recover for board and lodging furnished the deceased by the plaintiff, there was evidence tending to show that the deceased had rented to the husband of the plaintiff his home place, and visited and stayed with them at certain intervals and for certain periods of time, for which he promised to compensate the plaintiff by leaving her, at his death, the said home place; that the deceased had at one time executed a will to carry out this promise; that more than three years next

before the commencement of this action the plaintiff and her husband, upon default of the deceased, moved away from this place, and that the testator died, leaving no provision in his will to carry out his promise: *Held,* a question arose under the evidence as to whether the plaintiff and the deceased mutually abandoned the contract when the plaintiff and her husband moved from the land; and, if so, as a matter of law, her cause of action was barred by the statute; but if otherwise, she had the right to elect to wait until the death of the deceased and recover for the amount of her damages, as upon an implied promise to pay for the value of the services rendered.

7. Same—Measure of Damages.

Where the plaintiff is entitled to recover for board and lodging she had supplied a deceased person under his promise to leave her at his death a certain lot of land, which the deceased had failed to perform, and before his death had rendered performance by the plaintiff of her part of the agreement impossible, the measure of damages is the value of the land to be devised, less the cost and expense she would have incurred in performing her part of the contract, when she has elected to wait until the death of the deceased and sue for the full damages arising from his breach of contract.

(464) APPEAL by defendants from *Harding, J.,* at August Term, 1915, of RUTHERFORD.

Civil action. Plaintiff sued for the value of services rendered by her to the testator of defendants during the year 1905, and from that time to 12 December, 1910—in furnishing him board to November, 1908, and board and lodging the rest of the time. The evidence tended to show that the testator, in 1904, had rented to plaintiff's husband, Walter D. McCurry, a tract of land known as his home place, and that after he had taken possession of it, the testator occasionally visited plaintiff and her husband at their home on the land until the early part of the year 1905, when he suggested of his own accord that he did not think it right that he should stay so much with them and not pay for his board and lodging, as plaintiff was "put to a great deal of trouble and expense on his account," and it was not fair to plaintiff that he should stay there any longer without giving her some compensation for her services, and he then offered to give her, in his will, "one-half of the land on the south side of the big road," which he stated she would get at his death. The testator lived with his son, Dugger Freeman, until the latter's death in November, 1908, though visiting plaintiffs during the interim, and, in 1908, he moved to plaintiff's home and lived there until 12 December, 1910, when plaintiffs moved from the land and
(465) lived elsewhere. The testator died in January, 1915. The jury returned the following verdict:

1. Did the testator, J. G. Freeman, enter into a contract with the plaintiff that if she would live with him and take care of him that he

would in his will at his death compensate her for her services rendered him, as alleged? Answer: Yes.

2. Did the plaintiff render service to the defendants' testator as alleged? Answer: Yes.

3. In what amount, if any, are defendants indebted to plaintiff? Answer: $500.

4. Is the plaintiff's claim barred by the statute of limitations, as alleged? Answer: No.

Defendants appealed from the judgment upon the verdict, after reserving their exceptions.

No counsel for plaintiff.

Solomon Gallert for defendants.

WALKER, J., after stating the case: The first four exceptions in this appeal were taken to the competency of the male plaintiff, Walter D. McCurry, husband of his coplaintiff, to testify as to transactions and communications with the testator in regard to the services to recover the value of which this suit was brought. The ground of the objection to this testimony is that the wife's earnings belonged to her husband, and for this proposition is cited *Syme v. Riddle,* 88 N. C., 463. We said, in *S. v. Robinson,* 143 N. C., 620: "It is settled that the husband is entitled to the society and to the services of his wife, and, consequently, to the fruits of her industry. She cannot contract to render those services to another without his consent. Those rights were given to the husband, it is said, because of the obligation imposed by the law upon him to provide for her support and that of their offspring, and the right continues to exist. *Syme v. Riddle,* 88 N. C., 463; *Baker v. Jordan,* 73 N. C., 145; *Hairston v. Glenn,* 120 N. C., 341; *Kee v. Vasser,* 37 N. C., 553; *McKinnon v. McDonald,* 57 N. C., 1; *Cunningham v. Cunningham,* 121 N. C., 413. There was no evidence that the husband assented to the contract." *Justice Hoke* refers to the same subject in *Price v. Electric Co.,* 160 N. C., 450, at page 452, in these words: "Our decisions were rendered prior to the Martin act, Laws 1911, ch. 109, which practically constitutes married women free traders as to all their ordinary dealings, and we are not called on to determine the effect of this legislation on the question presented, as all the authorities here and elsewhere hold that a husband may confer upon the wife this right to earn and acquire property, in any event, when the rights of creditors do not intervene. *Syme v. Riddle, supra; Cunningham v. Cunningham,* 121 N. C., 414; *Peterson v. Mulford,* 36 N. J., 481; *Mason* (466) *v. Dunbar,* 43 Mich., 407."

We need not pause to inquire, therefore, how this question would be affected if this transaction had not taken place before the passage of the statute of 1911 (known as the Martin act). It all occurred prior to that time, and is governed by the law as it then stood. But we think the admitted facts in this case show that the husband fully assented to the contract of his wife with the testator, and his conduct at that time, and especially when considered in connection with what has since been done by him, is conclusive of his assent and equivalent to an agreement on his part that his wife should have and enjoy as her own separate property the earnings under the contract with the testator, the same as if she had been acting in her own behalf as a *feme sole*. He has evidently given his full sanction to her separate recovery in this suit and has assisted and aided to that end, and has shown that he has regarded the contract from its very inception as made solely for her benefit. *Price v. Electric Co., Supra.* We hold, therefore, that the wife is entitled to recover whatever is due under the contract, for her services, for her own separate and individual benefit. It follows that, having had no interest in his wife's separate earnings from this transaction, the husband was a competent witness in her behalf as to his dealings and communications with the testator. He is not disqualified as a witness because he may become a beneficiary under his wife's will, or because, if she dies intestate, he would succeed to her personal property, subject to the payment of her debts, as these are mere possibilities and too remote and speculative to be considered.

The next eight exceptions were taken to the testimony of the plaintiff, herself. We have examined them carefully with reference to what she said, and while some of the questions and answers appear to be harmless, others are close to the danger line, if they do not cross it; but we need only give the warning, in the hope that all apparent transgression of the statute will be avoided at the next trial.

The thirteenth exception is not mentioned in the brief and is, therefore, abandoned under our rule, but we may remark that there was evidence sufficient to carry the case to the jury, and the motion for a nonsuit was, therefore, properly denied.

The fourteenth exception, which was taken to the ruling of the court excluding the question put to the witness Bynum Owens, as to what the testator had said to him at the time he purchased certain goods at the store in Sunshine, is untenable. The evidence proposed to be elicited was nothing more than hearsay and was clearly inadmissible.

The fifteenth exception, addressed to a portion of the charge of the court to the jury, cannot be sustained. If we consider this excerpt from the charge alone, it is not subject to the criticism that it omitted (467) any reference to the evidence, or to the rule as to its weight or

preponderance, while instructing the jury as to the burden on plaintiff of proving the facts necessary to a recovery by her. We think it sufficiently states the correct rule and, with reasonable distinctness, it told the jury that the burden of proof was upon the plaintiff to make out her case and to offer evidence, "sufficient by its greater weight to *satisfy* them" of the truth of her allegation. But it is certainly clear and full enough, when construed with other parts of the charge, it having been long since settled that the latter should be considered as a whole. We are not permitted to construe away the plain meaning of a charge, when thus viewed, by any process of dissection which dismembers it and leaves only its separate parts before us. *Kornegay v. R. R.*, 154 N. C., 389; *McNeill v. R. R.*, 167 N. C., 390; *Aman v. Lumber Co.*, 160 N. C., 374. An objection much like this one was considered by us and overruled in *S. v. Jim Cooper, post,* decided at this term.

The sixteenth exception is covered by what we have said in regard to the one just preceding it. We think the judge instructed the jury substantially as to the burden of proof, in respect to the second issue. When the charge is read as a whole, it was sufficiently explicit, and we are satisfied the jury fully understood what was the law. The seventeenth exception is answered in the same way.

We come now to the eighteenth exception, as to the statute of limitations, and this depends altogether upon whether the contract was abandoned by the parties in 1910, when plaintiffs left the land and moved to another home. If the contract was mutually abandoned at that time, any cause of action in the nature of a *quantum meruit* that the *feme* plaintiff now has, to recover for services previously rendered, accrued then, and as more than three years have elapsed since that time and before the bringing of this action, she would be barred. If the contract was not mutually abandoned, and the plaintiff can recover on the special contract, then the statute will not bar, as the cause of action did not accrue until the death of the testator. As to whether the contract was abandoned is a mixed question of law and fact, as to what constitutes an abandonment being matter of law, and as to whether there has been an abandonment being a question depending upon how the jury may find the facts to be. The subject is discussed in *May v. Getty,* 140 N. C., 310. See, also, *Faw v. Whittington,* 72 N. C., 321; *Banks v. Banks,* 77 N. C., 186.

The complaint and evidence in this case indicate that plaintiff is suing upon the theory that she could not perform her part of the contract by reason of the testator's conduct, and that her withdrawal from the home place was caused thereby. She seeks to recover, not the price or measure of value fixed by the contract for her services, but on an implied assumpsit to pay for the actual services rendered what they are reasonably

(468) worth. It was said by *Justice Brown* for the Court, in *Tussey v. Owen,* 139 N. C., 457, at pages 461, 462: "There is a class of cases where, under some circumstances, the rigor of the common-law rule has been relaxed, and a person has been permitted to recover the actual value of his services, although failing to perform the entire contract on his part. In some cases the law implies a promise to pay such remuneration as the benefit conferred is really worth. *Dumalt v. Jones,* 23 How. U. S., 220. But we know of no authority to support the claim that the plaintiff could recover the full contract price, unless she had performed the contract. *Chief Justice Smith* quotes a number of such cases in *Chamblee v. Baker,* 95 N. C., 100, but he also quotes with approval from the opinion in *Munroe v. Phillips,* 8 Ellis & Black, 739: 'The inclination of the courts is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract nor for value of the work done, because the special includes an implied contract to pay. In such case, if the party has derived any benefit from the labor done it would be unjust to allow him to retain that without paying anything. Accordingly, restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when, by the nature of the agreement or by express provision, nothing is to be paid till all is performed.' The general rule is laid down in *Cutler v. Powell,* 2 Smith L. C., 1: 'But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then willfully refuses, without legal excuse and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special assumpsit.' This rule has been repeatedly recognized and acted on by this Court. *Thigpen v. Leigh,* 93 N. C., 47; *Lawrence v. Hester, ibid.,* 79. Some of the cases cited may have been modified so as to permit a recovery upon a *quantum meruit* when a recovery could not be had upon the contract for the contract price. But the authorities are uniform that no recovery can be had for the contract price unless the contract has been performed, and that is the ground upon which we put our decision."

In *Ducker v. Cochrane,* 92 N. C., 597, this Court held: "That one party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract or some legal excuse for a nonperformance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them." Referring to this passage in *Corinthian Lodge v. Smith,* 147 N. C., 244, *Justice Hoke* said: "This principle has been recognized and applied by us in many well-considered cases. *Tussey v. Owen,* 139 N. C., 457; *Jones v. Mial,* 79 N. C., 164; modified, but not on this point, in 82 N. C., 252; *Niblett v. Herring,* 49 N. C., 262; *Grandy v. McCleese,* 47 N. C., 142. And it is also well established that

when the stipulations imposed by such a contract on the complaining party are in the nature of conditions precedent a strict (469) compliance may be insisted on. *Mizell v. Burnett,* 49 N. C., 249; *Norrington v. Wright,* 115 U. S., 188; *Oakley v. Morton,* 11 N. Y., 25; *Pickering v. Greenwood,* 114 Mass., 479." *Chief Justice Smith* said, in *Chamblee v. Baker,* 95 N. C., at p. 101: "So stringent was the former practice that in an action upon a special contract to pay for service to be rendered, and which was rendered, no evidence in defense or to reduce the recovery was admissible to prove inattention, neglect, wasted time or other misconduct of the plaintiff, or dereliction in the undertaken duty, and the defendant was driven to a separate action for redress. *Hobbs v. Riddick,* 50 N. C., 80. It is otherwise under the present system, and the entire dispute, involving opposing demands, is now adjusted in a single suit. This is some relaxation of the doctrine regarding special contracts, and the enforcement of the obligations they create. The manifest injustice, upon such technical grounds of refusing all compensation for work done and not completed, or for goods supplied short of the stipulated quantity, and of allowing the party to appropriate them to his own use without paying anything, has been often felt and expressed by the judges, and a mode sought by which the wrong could be remedied."

We discussed this matter so fully in *Coal Co. v. Ice Co.,* 134 N. C., 574, at pp. 579, 580, that it is not improper that we should reproduce here what was said in that case: "Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other, and full performance is required before there can be any recovery, as in *Lawing v. Rintles,* 97 N. C., 350; but this rule does not apply if, for instance, work has not been done or materials furnished in strict accordance with the contract, provided one of the parties has received and enjoyed any benefit from the contract, and certainly not unless full performance is made a condition precedent to payment. The law implies a promise by the party to pay for what has been thus received, and allows him to recover any damage he has sustained by reason of the breach, for this is exact justice. The language of the Court in *Britton v. Turner,* 6 N. H., 492 (26 Am. Dec., 713), seems to fit the case: 'If, where a contract is made of such a character that a party actually received labor or materials, and thereby derived a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case—one not within the original agreement—and the party is en-

titled to "recover on his new case" for the work done—not as agreed, but yet accepted by the defendant.' In *McClay v. Hedge,* 18 Iowa, 66, the Court, by *Dillon, J.,* referring to *Britton v. Turner,* says: 'That (470) celebrated case has been criticised, doubted and denied to be sound, yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however it may be upon the technical and more illiberal rules as found in the older cases.' And the same Court, in *Wolf v. Geer,* 43 Iowa, 339, states it to be the settled doctrine 'that a party who has failed to perform in full his contract may recover compensation for the part performed, less the damages occasioned by his failure.' This principle is fully sanctioned by the authorities. *Chamblee v. Baker,* 95 N. C., 98; *Simpson v. R. R.,* 112 N. C., 703; *Gorman v. Bellamy,* 82 N. C., 496. In the last case cited this Court said: 'The inclination of the courts is to relax the stringent rules of the common law, which allows no recovery upon a special unperformed contract itself, nor for the value of the work done, because the special excludes an implied contract to pay. In such a case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise to pay such remuneration as the benefit conferred is really worth.' The Court also said, in *Brown v. Morris,* 83 N. C., at p. 257: 'If there had been delivered a smaller number of bricks, and they had been received and used by the defendant without objection, we see no reason why the plaintiff would not be entitled to compensation for such as were delivered; and we are not disposed to carry the doctrine that a partial delivery under an agreement to deliver a definite quantity or number of goods leaves the purchaser the possession and use of such as are delivered without liability to the seller, beyond the decided cases, and will treat it as operating only when the failure to deliver is willful and without legal excuse.' *Monroe v. Phelps,* 8 El. & B., 739; *Reade v. Rann,* 10 B. & C., 438; *Leonard v. Dyer,* 26 Conn., 172; 68 Am. Dec., 382; *Horne v. Batchelder,* 41 N. H., 86; *Bush v. Jones,* 2 Tenn., 190; *Duncan v. Baker,* 21 Kan., 99; *Lamb v. Brolaski,* 38 Mo. App., 51; *Myer v. Wheeler,* 65 Iowa, 390; *Hansen v. C. S. H. Co.,* 73 Iowa, 77; *M. L. Co. v Coal Co.,* 160 Ill, 85; 31 L. R. A., 529 The doctrine is well stated and supported by the citation of numerous authorities in 9 Cyc, 686 and 687, note 15."

We have quoted copiously from the principal authorities, because we regard the question as a very important one, entering, as it does, into our daily transactions, both large and small. It will be seen that the courts have gradually drawn away from the old and rigid rule of the common law and adopted a principle of decision more in harmony with our sense of justice and right. It must be borne in mind, as held in

Tussey v. Owen, and the other cases cited above, that where the contract is special and entire the price, as fixed by it, cannot be awarded if there has not been strict performance by the party who seeks to recover it. (471)

There is evidence in this case that the parties treated the special contract as at an end in 1910; that the plaintiff was compelled to leave the land by the testator's fault; and was thereby prevented from performing her part of the contract, and that intestate was willing that it should terminate then. If the jury shall find this to be the case, then the plaintiff can recover the reasonable worth of her services, but her cause of action would have accrued to her at the time of the abandonment and would be barred. If, on the contrary, they did not abandon the contract, or treat it as at an end, but she relied on the breach of it by him, in failing to perform his part of it and by his conduct preventing continued performance of her part of it, she had the right to wait until the intestate's death before suing upon the contract for its breach, especially as in this case it was stipulated by the intestate that he would devise her the land, which could not take place or be fulfilled until his death, as the will would take effect from that time. It appears that he had executed a will devising her the property, which he afterwards revoked, but this was no breach, as he had the full time, until his death to perform. Suppose she had sued him in 1910, and the contract had not been abandoned, and he had answered that he had complied with his undertaking, as far as he then could, by making a will in her favor as to the land, or, if he had not, that he would do so, and claimed the benefit of the unexpired period. Could she have recovered? We are of the opinion that, under the principle stated in *Buffkin v. Baird,* 73 N. C., at 290, and *Smith v. Lumber Co.,* 142 N. C., 26, there is a phase of the case which, if the facts are found by the jury to present it, will prevent the bar of the statute. We stated in *Smith v. Lumber Co., supra,* at marg. pp. 32, 33, the four remedies for the breach of a contract for services, and among them that the party may wait until the end of the term and then sue the delinquent for the salary, or the amount of compensation fixed by the parties in their contract, less, in that case, any amount earned in the meantime by the plaintiff, or which he could have earned by reasonable effort, and, in this case, and as to this plaintiff, less the cost and expense of performing her part of the contract, so that if the plaintiff has chosen to treat the contract as merely breached by the intestate, and has further elected to wait until his death occurred and sue for the full compensation, which would be the equivalent in money of the land agreed to be devised, less the proper deduction therefrom, she had the right to do so, and in that case there would be no bar of the statute, as the cause of action did not accrue until his death.

These propositions are all based upon the assumption that the plaintiff was not in fault, but was at all times ready, able and willing to perform the contract on her part. It must not be supposed that when defendant's intestate breached the contract, if such is the case, that plaintiff could not immediately renounce it herself and sue for her
(472) damages, for that was her right. *Smith v. Lumber Co., supra; Hursey's case,* 91 S. C., 618 (74 S. E., 618). The case last cited decides that where a person who has agreed for a valuable consideration to devise or bequeath property, breaches the contract, the other party may elect to regard the contract as at an end and sue at once for damages, and this is the first remedy stated in *Smith's case, supra.* If the contract was breached in 1910, we see nothing to show, as the evidence now is, that plaintiff made any election to sue on account of it, but the contrary rather appears. If both had abandoned the contract, as we have said, she was bound to sue then, and not wait for intestate to tender performance in his will, for that part of the contract was annulled. On the question whether intestate's conduct was such as to prevent plaintiff remaining with him and performing her part of the contract, we refer to *Prater v. Prater,* 94 S. C., 267 (77 S. E., 936).

The verdict and judgment will be set aside, and the case submitted to another jury to find the facts upon which the defendant's liability depends, as there was substantial error in the particulars indicated.

New trial.

CLARK, C. J., concurring in result: When the Constitution of 1868, Art. X, sec. 6, in accordance with the sentiment of a more enlightened age, abolished the common-law system under which the property of a married woman became the property of her husband on marriage, it provided not only that all property which she had at the time of the marriage should "be and remain the sole and separate estate and property of such female," but, also, that she should retain all property "to which she may after marriage become *in any manner entitled.*" Thus, in the fullest and most explicit manner, the earnings of the wife after marriage were guaranteed to her by the Constitution.

It is true that now, as always, the husband is entitled to the services and society of his wife, and, in like manner, she is entitled to the services and society of her husband; but this does not give the wife ownership of the earnings of her husband, nor, since the Constitution of 1868, has it given the ownership of her earnings to the husband. It was doubtless in sheer inadvertence to this distinction that in *Syme v. Riddle,* 88 N. C., 463, this Court held that though the Constitution was as above quoted, the wife could not have her own earnings because no statute of the Legislature had been passed to that effect.

In *Price v. Electric Co.* the majority of the Court held, in deference to *Syme v. Riddle,* that, not only the earnings of the wife from taking in washing, but that the damages for her loss of her leg and physical and mental anguish and loss of time belonged to her husband, though stating that the contrary was held in other States. The General Assembly, at its session shortly thereafter, enacted ch. 13, Laws 1913, which provides as follows: "The earnings of a married woman by virtue of (473) any contract for her personal service, and any damages 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.*"

It will be thus seen that this matter has been finally settled in accordance with the express terms of the Constitution, which gave to the wife all that she, *"in any manner,* might acquire after marriage." The right of a wife to her earnings does not depend upon the consent of the husband, as was held in *Syme v. Riddle,* but upon the Constitution and the statute which vests her earnings in her as fully as the husband has a right to his. As already said, this no more interferes with the liability of each and the duty of each to the other than does the constitutional provision that the wife owns her property free from any control by the husband.

Cited: Aiken v. Ins. Co., 173 N. C. 403 (6g); *S. v. Killian,* 173 N. C. 795 (5g); *West v. Laughinghouse,* 174 N. C. 217 (6g); *Poe v. Brevard,* 174 N. C. 713 (6g); *S. v. Orr,* 175 N. C. 777 (5g); *Hayman v. Davis,* 182 N. C. 565 (6g); *Edgerton v. Taylor,* 184 N. C. 578 (6g); *Shore v. Holt,* 185 N. C. 313 (6g); *Wood v. Wood,* 186 N. C. 560 (6l); *Chandler v. Marshall,* 189 N. C. 302 (4f); *Colt v. Kimball,* 190 N. C. 174 (6g); *Ritchie v. Ritchie,* 192 N. C. 540 (6g); *Highway Com. v. Rand,* 195 N. C. 804 (6p); *Wade v. Lutterloh,* 196 N. C. 121 (6g); *Redmon v. Roberts,* 198 N. C. 164 (6g); *Grantham v. Grantham,* 205 N. C. 369 (6g, 7o); *Lipe v. Trust Co.,* 207 N. C. 796 (6g, 7d); *Barron v. Cain,* 216 N. C. 284 (6g); *Coley v. Dalrymple,* 225 N. C. 68 (1g); *Dunn v. Brewer,* 228 N. C. 44 (6l).

W. G. PENNINGER v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 15 December, 1915.)

Negligence—Contributory Negligence — Railroads — Crossings — Trials—Evidence—Questions for Jury.

In an action to recover damages for a personal injury inflicted by a passing train of defendant railroad company, as the plaintiff was crossing the defendant's track on foot, there was evidence tending to show, and *per contra*, that the place was a much-used public crossing; that the train was moving from the east at an unusual and improper speed and without giving signals or other proper warnings; that the plaintiff had stopped, looked and listened before entering upon the track; that towards the east there was a pile of cross-ties extending 75 feet from the track, and a traction engine obstructing the view, and while the plaintiff was looking for a train which was expected from the west, the train from the east ran upon him unexpectedly, and as he heard the wheels of the approaching train he sprang to escape from the track, but his foot caught, causing him to make two or three hard jerks before he could free himself, preventing him from doing so in time: *Held*, the case was properly left to the determination of the jury upon the issue of contributory negligence.

APPEAL by defendant from *Lane, J.*, at April Term, 1915, of MECKLENBURG.

Civil action. The action was to recover damages for injuries caused by the alleged negligence of defendant company. It was alleged, and there was evidence on the part of plaintiff tending to show that, on or about 12 March, 1914, while plaintiff was endeavoring to cross defendant's track at a public crossing, in the suburban village of North Tryon, Charlotte, N. C., he was run on and severely injured by one of
(474) defendant's trains coming from the east; that the train was moving at an unusual and improper rate of speed and ran on crossing without giving the signals or other adequate warning, and, further, that as plaintiff endeavored to jump from the track and avoid the injury, his foot was caught in an opening or hole between the rail and surface plank and he was thereby so hindered that his escape was prevented. Defendant denied negligence and alleged contributory neglignce on the part of plaintiff, and offered evidence tending to support its positions.

On the issues of negligence, contributory negligence and damages, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

Cansler & Cansler for plaintiff.

Tillett & Guthrie for defendant.

HOKE, J. It was urged for error on the part of defendant that the case should have been nonsuited on motion, and chiefly upon the ground that plaintiff, on his own showing, was guilty of contributory negligence as a matter of law. The position is allowed to prevail in restricted instances, when upon the entire testimony making in support of plaintiff's claim, accepted as true and construed in the light most favorable to him, it is clear that he has been guilty of contributory negligence. *Trull's case,* 151 N. C., 545; *Neal's case,* 126 N. C., 638, and others. But the principle may not be applied to the facts as they appear in the present record.

On the trial of the issues, the evidence on the part of plaintiff tended to show that, on the afternoon of 12 March, 1914, about 6 o'clock, plaintiff left Kensington's store, about 125 to 150 feet from the crossing, going towards his home, which was on the other side of the track; that, on the way towards the crossing and extending 75 feet from the track, there were piles of cross-ties which obstructed the view of the track towards the east, and, further, there was a traction engine on the right of way, also obstructing the view; that plaintiff could see the rail track as he left the store and for 70 feet or so, and that he looked and listened for a train in that direction and heard no signal or anything to indicate its approach; that there was five feet open space from the track to the first pile of cross-ties, and as plaintiff stepped on the crossing he looked towards Charlotte, as he was expecting a train from that direction, and, as he was passing over the crossing, he heard the wheels of the train approaching from the east, and, as he sprang to escape from the track, his foot went down in a hole or open space, so that he had to make two or three hard jerks before he got loose, and as he turned his shoulder towards the train he was struck by the beam of the engine pilot and thrown about 140 feet, breaking his arm in two or more places so that it had to be amputated; that the schedule time for this train, (475) going towards Charlotte, was 2 o'clock; that this was a much-frequented crossing of a public road running through North Tryon, a suburban mill village of the city of Charlotte, and the train in question was going at a rapid rate of speed and ran on the crossing without signal or other warning. Upon this, the evidence in support of plaintiff's claim, and under the principles established in numerous cases on the subject, the issue of contributory negligence on part of plaintiff was necessarily and properly submitted to the jury for decision. *Johnston v. R. R.,* 163 N. C., 431; *Fann v. R. R.,* 155 N. C., 136; *Wolf v. R. R.,* 154 N. C., 569; *Farris v. R. R.,* 151 N. C., 483; *Inman v. R. R.,* 149 N. C., 126; *Morrow v. R. R.,* 146 N. C., 14; *Sherrill v. R. R.,* 140 N. C., 257; *Norton v. R. R.,* 122 N. C., 910.

Speaking to the question in *Farris' case, supra, Associate Justice Manning* said: "While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well-considered decisions of this and other courts, yet 'it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightly directed to something else as well' (3 Elliott on Railroads, sec. 1166 a), or that he failed to look in opposite directions at the same moment of time. As is said by *Mr. Justice Hoke, in Sherrill v. R. R.,* 140 N. C., 252: 'It is further held that, negligence having been first established, facts and attendant circumstances may so qualify this obligation to look and listen as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed.' *Inman v. R. R.,* 140 N. C., 123; *Morrow v. R. R.,* 146 N. C., 14."

And in *Rodrian v. R. R.,* 125 N Y., 526, quoted with approval in *Sherill's case, supra, Agnew, J.,* said: "But when one has looked for an approaching train, it does not necessarily follow as a matter of law that he was remediless because he did not look at the precise time and place when and where looking would have been to the most advantage."

In the present case, accepting plaintiff's evidence as true, he had looked and listened for a train coming from the east as he left the store, and for the first 23 steps, until his view in that direction was obstructed by the traction engine, and piles of cross-ties placed by the company on its right of way, and, in the two steps open, as he stepped upon the cross-ties he looked towards Charlotte, the other direction, because the train was then expected from that point, the schedule time for the present train having been long past, when he was run over and injured by a train coming at an improper rate of speed through a mill
(476) village and which ran on a much frequented crossing without any warning. There was evidence also permitting the inference that the crossing was not in a proper condition, under the principle approved in *Goforth v. R. R.,* 144 N. C., 569; *Raper v. R. R.,* 126 N. C., 568.

In support of defendant's position, we were referred by counsel to *Trull's case,* 151 N. C., 545, and to *Mitchell's case,* 153 N. C., 116, and to *Coleman's case,* 153 N. C., 322.

In *Trull's case* the intestate, standing at a crossing in a position of safety, stepped unexpectedly in front of a switching engine which ran onto the crossing without giving any warning, and was killed. The engine had passed him just a moment before, giving indication that the tracks were being used for switching purposes. There was nothing to

obstruct the intestate's view or to distract his attention, and the Court held that there was nothing to qualify the intestate's obligation to be careful for his own safety, and he was guilty of contributory negligence as a matter of law.

And speaking to the precise question as presented in the cases of *Coleman* and *Mitchell, supra,* in a subsequent case of *Fann v. R. R.,* 155 N. C., 136, the Court said: "In *Coleman's case* the plaintiff testified, it is true, that he had both looked and listened, but he also stated that he had done this some distance back from the crossing where his view was obstructed by houses, and that he afterwards, in daylight, drove in a buggy 'with curtains buttoned down both sides and back, across an open space of 65 feet, affording full opportunity to see down the track the way the train came for three-forths of a mile, and without any effort to further look or listen.' There was nothing here to qualify his obligation to care for his own safety, and recovery was denied. In *Mitchell's case* a deaf and dumb negro, familiar with the schedule of the trains and a frequenter of the train yards, walking towards the crossing just at the time when a train was scheduled to arrive, stopped where a box car obstructed his view and then, with eleven feet of clear space, walked across the track without looking just as a fast train approached, and was struck and permanently injured. There was no evidence that plaintiff had listened for signals, and, hearing none, was induced to venture on the track for that reason, as in *Inman's case* and in *Norton's case.* There was nothing shown to distract his attention."

On the facts appearing in the present appeal, the case comes rather under the principle as applied in *Inman's case* and *Norton's case, supra,* and, in our opinion, as stated, the motion to nonsuit was properly denied.

There was abundant evidence on the part of defendant tending to show that the defendant's train was being properly operated at the time and that the proper signals were given, and, furthermore, that plaintiff received his hurt because he was not properly attentive to his own safety. But, under a charge free from error, the jury has accepted plaintiff's version of the occurrence, and, this being true, it is clear (477) that an actionable wrong has been established.

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

No error.

Cited: Lee v. R. R., 180 N. C. 418 (d); *Jackson v. R. R.,* 181 N. C. 157 (g); *Wyne v. R. R.,* 182 N. C. 256 (g); *Pope v. R. R.,* 195 N. C. 70 (d).

J. W. KIRKPATRICK ET AL. V. PIEDMONT TRACTION COMPANY.

(Filed 15 December, 1915.)

1. Municipal Corporations—Streets—Abutting Owners—Railroads—Street Railways—Additional Servitude.

A street railway, under the usual acceptance of the term that such is a railway which takes on and discharges passengers at its various local stops, generally at the corners of streets in the town or city in which it operates, is regarded as facilitating rather than interfering with local traffic, and, as such, does not impose an additional servitude on the streets for which compensation may be had by the abutting owner.

2. Same—Equipment—Incidents—Motive Power.

The operation of an ordinary steam railroad on the streets of a town or city imposes an additional burden to use the street for the purposes of the municipality, and where a railway, though operated by electricity, engages in hauling freight over its lines in trains of several freight cars, baggage and mail cars, etc., such as used by a steam railroad, with the incidental noises and inconveniences attending the operation of the ordinary steam railroads, with which it connects and exchanges traffic, it is regarded as an ordinary carrier of goods operating by steam, and requires that compensation be made to the abutting owner on the street for its additional servitude.

3. Municipal Corporations—Streets — Railroads — Damages — Statutes — Common Law.

Where a statute authorizes the operation of a steam railroad along the streets of a city without providing for damages to the abutting owner for the additional servitude of the streets, the remedy for such compensation exists at common law.

4. Municipal Corporations — Streets — Additional Servitude — Abutting Owner—Proprietary Interests—Damages.

It is not necessary that the abutting owner on a street should have the fee-simple title, subject to the city's easement, for him to recover damages for additional servitude thereon imposed by the operation of a steam railroad, for he has such proprietary interest in the street as will prevent its use for other than the public purposes of a street.

APPEAL by plaintiff from *Lane, J.*, at April Term, 1915 of GASTON.

Civil action. At the conclusion of the evidence a motion to nonsuit was made and allowed. The plaintiff excepted and appealed.

P. W. Garland, R. C. Patrick and Stewart & McRae for the plaintiff.
Osborne, Cooke & Robinson for the defendant.

(478) BROWN, J. This action is brought to recover of the defendant damages for operating a commercial railroad, consisting of freight

traffic as well as passenger traffic, along Franklin Avenue in the town of Gastonia, upon which the plaintiff lives in a house owned by him on a lot abutting upon the said avenue. The defendant operates a street car line of the city of Gastonia. The defendant also operates freight trains and interurban passenger trains over this avenue in front of plaintiff's house. The defendant's line of railroad runs from Gastonia to Charlotte, N. C., Its interurban passenger cars and trains carry passengers between these two points and intermediate points. Its freight trains likewise handle freight between these two points and intermediate points, and, in addition, it transfers its freight cars to the Seaboard Air Line Railway, the Southern Railway and the Carolina and Northwestern, and these roads in turn transfer cars from their lines, loaded with freight, to the defendant's lines. It is a regular standard-gauge railway, using electricity as a motive power instead of steam.

Plaintiff bases his right to recover on three different allegations, namely:

1. On account of the operation of freight trains and interurban passenger trains over the avenue in front of his property.

2. On account of the raising by the defendant of the grade of the avenue above the level of the plaintiff's lot.

3. On account of the taking of a strip of the plaintiff's lot and trespassing upon his lot by dumping earth thereon and otherwise damaging same.

We have held in this State, as in other States, that a street railway does not constitute an additional servitude for which the abutting lot-owner may recover, for the reason that it facilitates rather than impedes or interferes with local traffic. The term "street railway" has acquired a peculiar meaning and is well understood to be nothing more or less than a passenger railway which takes on and discharges passengers at its various local stops, generally at the corners of streets in the town or city in which it operates. *Hester v. Traction Co.*, 138 N. C., 293; *Merrick v. R. R.*, 118 N. C., 1081.

It has also been held in this State that the use of a public street for an ordinary steam railroad is not a legitimate use of the street for public purposes, and that the city cannot authorize the construction of such railroad along the public streets against the abutting proprietor's will without compensation to him for the injury sustained. *White v. R. R.*, 113 N. C., 610.

While the Legislature may authorize the use of a street by the railroad so as to make the entry lawful, such use is an additional burden, and the right will not become fixed in the company until the compensation is made. If no remedy is provided in the statute, (479)

there remains the remedy at common law. Mills on Eminent Domain, section 204.

It is immaterial, so far as recovering damages goes, whether the fee of the street is in the city or in the abutter. Although the abutting proprietor may not own the fee in the street, he has such proprietary interest in the same that will prevent its use from being perverted to other than public purposes as a street. *White v. R. R., supra; Staton v. R. R.,* 147 N. C., 428; *Butler v. Tobacco Co.,* 152 N. C., 417.

We are of opinion that, from the nature and description of the defendant's business, as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and cannot be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

The testimony in this case tends to prove that the passenger cars used by the defendant in its interurban service are about the same size as those used on the great railroads of the country. These interurban passenger trains carry baggage, mail and other things that are carried by other passenger railways. The freight cars used by the defendant are similar to cars used on the ordinary railroads of the country and of the same standard gauge. These freight cars are transferred to other lines and the freight cars of other lines are transferred to this defendant's line in all respects as is the custom between the railroads of the country. The freight cars are the usual standard cars—about sixty feet long.

The plaintiff testifies:

"The dust is wafted on and into my house. My porch is six or eight feet from the sidewalk. The cars make a rumbling sound, creaking of wheels and ringing of bells and vibrations. I lived on the lot in question from the time I bought it in 1905 until I moved away from Gastonia in 1910. I have rented it since. In my opinion the difference in the market value of the property before and after the construction of the railroad is $2,000."

The testimony tends to prove that trains of freight cars, as many as five in number, with an engine ringing its bell, frequently pass along this street, and when they do the vibrations of the earth can be felt. The evidence tends to prove that these electric freight trains raise dust, blow whistles, vibrate the earth, roar with noise, and tend to imperil life as well as to injure property upon the street.

In 1 Lewis Eminent Domain, p. 287, it is said substantially that while the street passenger railway is a legitimate street use, the commercial railroad is not. In so far as it is operated as a street passenger railway

in aid of the city travel, it is on the same basis as the urban street railway; if not operated for the accommodation of the local (480) travel, in substantially the same manner as the urban railway, it should be classed with the commercial railroad, with consequent liability to abutting owners.

In *Younkin v. Traction Co.*, 98 N. W., 215, where the defendant operated an electric street railway company and did an interurban passenger business, the Wisconsin Court said: "We must hold that the running of such interurban trains and cars over the street railway track upon Lincoln Avenue was an additional burden upon the lands of the plaintiff as such abutting lot-owner."

The same Court, in *Abbott v. Traction Co.*, 126 Wis., 634, 106 N. W., 523, 4 L. R. A. (N. S.), 202, held: That an electric interurban railway is additional servitude upon the street, and the abutting property owner is entitled to compensation therefor.

In *Wilder v. Traction Co.*, 216 Ill., 493, 75 N. E., 194, the Illinois Court held: "Where an electric street railway company, organized under the railroad law, as distinguished from the street railroad act, by the terms of its charter was authorized to operate through several counties and transport passengers, baggage, mail, express and milk, it was a commercial railroad, and was not entitled to lay its tracks in the street, the fee of which was in the abutting owners, without condemning the right to do so."

In *Schaaf v. R. R.*, 66 O. State, 215, 64 N. E., 145, where an electric interurban railroad was operated upon the public highway, and where the railway company had authority to run an unlimited number of cars and trains for the carrying of passengers and the transportation of freight, express matter and Government mail, the Ohio Court held that *such a railroad constituted additional servitude for which the abutting property-owner was entitled to compensation.*

The following cases also hold that the abutter is entitled to compensation: *Aycock v. Brewing Co.*, 68 S. W., 953 (Tex.); *Rische v. Transcontinental Co.*, 66 S. W., 324; *Kinsey v. Traction Co.*, 81 N. E., 922-940 (Ill.).

It is useless to discuss the second and third grounds of damage set forth in the plaintiff's complaint. It is too plain for argument that if these allegations are true, they would constitute an element of damage for which the plaintiff would be entitled to recover.

The judgment of nonsuit is set aside and a new trial ordered.

Reversed.

Cited: Caveness v. R. R., 172 N. C. 307 (f); *Turner v. Public Service Corp.*, 174 N. C. 527 (d).

(481)

D. E. BARKLEY v. ATLANTIC COAST REALTY COMPANY.

(Filed 15 December, 1915.)

1. Contracts—Sale of Land—Principal and Agent—Guarantee of Agent—Liens.

In a contract made for the platting of land in a town into lots and boosting the sale with a brass band, advertising and other methods, specifying how the expenses were to be proportioned between the parties, the defendant, whose business it was to make sales of this character, by express provision of article 3 of the contract, agreed to pay the plaintiff $8,000 on the day of the sale and half the amount the property would bring beyond that sum, and was to receive $300 as expenses, to be deducted from his part of the profits: *Held*, the payment of the $8,000 was a guarantee on defendant's part to which it was obligated, and the trial judge correctly directed its payment, and interest, into court, to be applied, in this case, by the clerk to the discharge of all liens on the land, and the balance to the plaintiff on his tendering to defendant an indefeasible deed to the property.

2. Contracts, Duplicated—Change in Copy—Original Contract.

Where the remainderman contracts that the lands shall be sold upon a contingent profit by another acting as sales agent, which was executed in duplicate, and he afterwards has the life tenants to sign his copy so as to bind them to the agreement, it is held that the alteration of this copy in the respect stated did not affect the original agreement as stated in the copy of the other contracting party; and further, that it was in furtherance of his interest and not prejudicial to it.

3. Contracts—Reformation—Evidence.

In this action to reform a written contract for mutual mistake, the verdict of the jury establishing the contract as written is held to be supported by the evidence.

APPEAL by defendant from *Daniels, J.*, at February Term, 1915, of FRANKLIN.

Bickett, White & Malone for plaintiff.

W. H. Yarborough, B. T. Holden and Manning & Kitchin for defendant.

CLARK, C. J. The contract sued on recites "that for and in consideration of the sum of $1, paid to the party of the second part by the party of the first part, and for further considerations mentioned, the party of the second part does agree to offer for sale for the party of the first part on 11 May, 1914, a certain plat of dwellings and lots located in the town of Franklinton, in the county of Franklin, in the State of North Carolina, containing about 270 x 210 feet and 150 x 250 feet adjoining main prop-

erty on the south, more or less, of various sizes, on the following terms and conditions." The first was that the party of the second part would, at its own expense, grade and diagram the property, and, on the day of sale, furnish a band of music and all the prizes that would be given.
2. The party of the second part agreed to advertise lots through (482) newspapers, by handbills, personal letters, etc., to furnish auctioneers to cry the bids, markers to show the size of the lots, experienced ground men to mingle among the crowd to boost the sale, bookkeeper to keep the account of the sales, and other necessary help. Further, the party of the second part agreed to do everything in its power to cause each and every lot sold "to bring the last and highest dollar," and, after the sale, to attend to the collection of the first payment from the purchasers, to secure signed notes for the deferred payments, prepare all deeds, and so forth, and, further, that if the weather should be so rainy or bad as to make a postponement of the sale advisable, another day would be named, and the party of the second part would readvertise and make the sale.

While the transaction with the defendant was for the purpose of making sale of the property in the customary manner, and not a contract of the defendant to purchase the property outright, the defendant, in the third article of agreement, stipulated as follows: "3. The party of the second part agrees to pay to the party of the first part eight thousand dollars ($8,000) in cash on day of sale (11 May, 1914), and one-half of all over $8,000 that said property may bring. The party of the first part agrees to pay to the party of the second part $300 as expenses, the amount to be deducted from the party of the first part's average on said property. The parties to this contract agreed to divide the discount allowed purchasers for cash payment on day of sale."

It appears from the evidence that a printed form of the realty company was used, which was closely followed except that printed paragraphs 3 and 4 were struck out, and the above clause 3 was inserted.

The construction of a contract, when in writing or agreed upon, is a matter of law for the courts, and, besides, in this case it was agreed as follows: "Only the second issue shall be submitted to the jury, this being the only one about which the facts are in dispute, and the judge shall answer the other issues as conclusions of law." The court properly held that the above third article was a guarantee on the part of the defendant that it would pay the plaintiff the sum of $8,000 in cash on the day of the sale. The contract further specified, as above stated, in regard to the division of expenses and of receipts over and above said $8,000.

The second issue was: "Was the contract sued upon signed by mutual mistake of the parties, as alleged in the answer?" To which the jury responded, "No." The facts in regard to the alleged alteration were

that some ten days after the execution of the contract, without the consent or knowledge of the defendant, the plaintiff had the names of Mary P. Clegg and E. B. Clegg put in the contract and caused them to sign it before a notary. The Cleggs owned a life estate in the property. (483) This addition was made only in the copy held by the plaintiffs and not in the defendant's copy, and could in no wise prejudice them. It was only an additional assurance given by the plaintiff for the benefit and satisfaction of purchasers. Even a material alteration in a duplicate original does not vitiate the contract. 2 Cyc., 224; *Jones v. Hoard* (Ark.), 43 Am. St., 17.

As to the main controversy, as to the liability and the nature of the contract, it was in evidence that H. M. White, the treasurer of the defendant company, stated to Mr. Bickett over the phone, in reply to a question whether the defendant had accepted the contract, "Yes; I wrote you last night that we have accepted your contract to pay you $8,000 on the day of the sale, and I wrote you to that effect last night, and you will no doubt get the letter today." The letter to that effect was received and put in evidence.

There was evidence in support of the plaintiff's contention as to the second issue, and the other issues were matters of law and correctly answered by the judge. The judgment directs that the $8,000 and interest shall be paid into court and applied by the clerk to the discharge of all liens on property, and the balance paid to the plaintiff on tender of an indefeasible deed to the property to defendants.

No error.

Cited: King v. Davis, 190 N. C. 741 (1g); *Cole v. Fibre Co.,* 200 N. C. 487 (1g).

HARRIET S. O'NEAL v. C. J. BORDERS.

(Filed 15 December, 1915.)

1. Estates—Wills — Devises — Bodily Heirs — Contingent Limitations — Deeds and Conveyances—Fee Simple.

A devise of land to S. "to belong to her and her bodily heirs, and should she die and leave no bodily heirs, it then comes back to her brothers and sisters": *Held,* a devise of a fee-simple title to S., defeasible on her dying without bodily heirs in the sense of lineal descendants, in which event the estate would go to the brothers and sisters of S. direct from the testatrix. Hence S. cannot convey a good title to the lands so devised, there being a contingent interest outstanding in her brothers and sisters.

2. Same—Husband and Wife—Privy Examination.

The rule of construction applicable to wills which will prevent the first taker from making a valid conveyance in fee of lands when, under its terms, there is a contingent outstanding estate in others, applies also to deeds; and where a deed has been made by the same testatrix, before her death, upon the same limitations, without having had her privy examination taken, it is, for the want of such examination, further ineffectual. *Wallin v. Rice, ante,* 417; *Warren v. Dail, ante,* 406, cited and applied.

APPEAL by defendant from *Justice, J.,* heard at chambers by consent, 25 September, 1915; from CLEVELAND.

Controversy heard on case agreed. It appeared that plaintiff, (484) formerly Harriet S. Borders, had contracted to convey the land in controversy to defendant at a stipulated price, and payment was resisted by defendant on the ground that plaintiff could not make a good title. The court, being of opinion that the title offered was a good one, entered judgment for plaintiff, and defendant excepted and appealed.

Eaves & Edwards for plaintiff.

Ryburn & Hoey for defendant.

HOKE, J. Under the facts agreed upon the ownership of the property was in Susan Borders, mother of plaintiff, and the title now in question is properly made to depend upon the correct interpretation of her last will and testament, in which she devised land to plaintiff in terms as follows: "I devise to Harriet S. Borders (now Harriet S. O'Neal, plaintiff), my youngest daughter, 100 acres of land nown as the Daniel Hicks tract, etc., . . . and it to belong to her and her bodily heirs; and should she die and leave no bodily heirs, it then comes back to her brothers and sisters."

Under various decisions of the Court, construing devises in these or substantially similar terms, the will conveyed to plaintiff the title in fee simple, not absolute, but defeasible on her dying without bodily heirs in the sense of lineal descendants. *Burden v. Lipsitz,* 166 N. C., 523, citing *Rees v. Williams,* 164 N. C., 128; same case, 165 N. C., 201; *Smith v. Lumber Co.,* 155 N. C., 389; *Perrett v. Bird,* 152 N. C., 220; *Harrell v. Hagan,* 147 N. C., 111.

The title tendered in this case is not, therefore, a good one, for, by the express language of the devise, if the contingency should occur and Harriet O'Neal, the devisee and taker of the first estate, should die without such descendants, the property would go to the brothers and sisters of the plaintiff, these, in such case, to take and hold the estate direct from the testatrix. *Sessoms v. Sessoms,* 144 N. C., 121.

Plaintiff's deed, therefore, would not conclude the ultimate holders. *Hobgood v. Hobgood,* 169 N. C., 485. As pointed out in the *Sessoms case,* prior to the act of 1827, Rev., 1581, this limitation would have been too remote as being against the policy of the law which concludes perpetuities, but the statute established a rule of construction by which these and similar limitations may very generally be upheld by providing, as it does, "That every limitation in any deed or will made to depend upon the dying of any person without heirs or heirs of the body or without issue or issues of the body or without children or offspring, shall be held and interpreted a limitation to take effect when such person shall die without having such issue, etc., living at the time of her death or born within ten lunar months thereafter, unless the intention of such (485) limitation shall be otherwise plainly and expressly declared on the face of the will."

The deed referred to in the case agreed, by which Susan Borders and her husband, T. G. Borders, undertook to convey the land to plaintiff, prior to the devisee's death, was ineffective to pass the title for want of the privy examination of the said Susan. *Wallin v. Rice, ante,* 417; *Warren v. Dail, ante,* 406. But, if it were otherwise, the deed contains the same limitation, the language of the instrument purporting to convey the property being "to plaintiff and her bodily heirs forever; and should she leave no bodily heirs, it is then to be divided among her brothers and sisters."

There is error in the judgment of the court, and, on the facts stated, the same must be

Reversed.

Cited: Williams v. Blizzard, 176 N. C. 148 (1f); *Patterson v. McCormick,* 177 N. C. 455 (1f); *Parrish v. Hodge,* 178 N. C. 134 (1g); *Christopher v. Wilson,* 188 N. C. 760 (1f); *Grace v. Johnson,* 192 N. C. 735 (1f).

D. L. HOPKINS, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 22 December, 1915.)

1. Railroads—Negligence—Last Clear Chance—Evidence.

Where the plaintiff's intestate has been killed on the defendant railroad company's trestle by its passing train, and in an action for damages the issue of the last clear chance arises, as to whether the engineer of the defendant, by keeping a proper lookout, could have avoided the injury notwithstanding the intestate's contributory negligence in having placed

himself upon the trestle, it is competent for witnesses to testify, from their own knowledge and experience, as to the distance the engineer could have seen the intestate if he had been keeping a proper lookout; and, by those experienced in such matters and familiar with the roadway at the place, the distance within which the train could have been stopped at the place, according to its speed, length and weight.

2. Evidence—Nonsuit.

The evidence is considered in the light most favorable to the plaintiff upon defendant's motion to nonsuit thereon.

3. Railroads—Negligence—Last Clear Chance—Proximate Cause—"Lookout."

In an action to recover damages for the negligent killing of plaintiff's intestate the fact that the intestate negligently went upon the trestle and was there killed by defendant's passing train will not absolve the company from its duty to keep a proper lookout ahead and use proper efforts to stop the train in time to avoid the killing; and if the defendant fails in this duty, and this causes the death, the negligence of the defendant therein is the proximate cause, and fixes its liability. *Bogan v. R. R.*, 129 N. C., 156.

4. Negligence—Evidence—Proximate Cause—Trials—Questions for Jury.

Proximate cause of an injury will not be determined as a matter of law when more than one inference can be drawn from the evidence; for then it is a question of fact for the determination of the jury.

5. Appeal and Error—Verdict—Instructions—Harmless Error.

The verdict of the jury on an issue in appellant's favor cures an error in the court, if any committed, in refusing to give a requested instruction on that issue.

6. Railroads—Trespasser—Permissive Use.

Where a trestle of a railroad company has been used as a passway for a great many years a person injured thereon by a passing train is not regarded as a trespasser, and the company is required to keep a sharp lookout at the place and give timely warning to prevent a collision.

APPEAL by defendants from *Cline, J.*, at May Term, 1915, of (486) HAYWOOD.

W. J. Hannah and Alley & Leatherwood for plaintiff.
Martin, Rollins & Wright for defendant.

CLARK, C. J. This was an action to recover damages for the negligent killing of the plaintiff's intestate, David Hopkins, who was killed on the trestle east of Waynesville on 4 July, 1914, by defendant's train going east. There was evidence that the trestle was 10 or 12 feet above the water; that David Hopkins could not swim and was endeavoring to get off the trestle when he was struck and killed.

Defendant's exceptions 1, 2, 3, 5, and 6 were to the admission of evidence for the plaintiff as to the distance from which, on the west side of the trestle, the employees of defendant operating said train could have seen plaintiff's intestate on the trestle if they had been keeping a proper lookout. This evidence was competent. *Tyson v. R. R.*, 167 N. C., 216; *Gray v. R. R., ib.*, 435; *Draper v. R. R.*, 161 N. C., 311. The witnesses spoke from their own knowledge of the situation of the trestle and track and surroundings at the spot where plaintiff's intestate was killed; and two of them had been in the employ of the defendant for many years on its trains passing this place daily.

Defendant's exceptions 4, 7, and 8 are to the admission by the court of evidence as to the distance within which the train could have been stopped after the plaintiff's intestate was seen, or, with the proper lookout, should have been seen on the trestle. Two of these witnesses had been for many years firemen on the defendant's road, passing over this trestle and familiar with the curve and conditions, and one of them had experience in running an engine. Another had been for five years a locomotive engineer and was familiar with the track at the trestle. The testimony was clearly competent, and, besides, the jury could have formed their own opinion on these points as a matter of common knowledge after a description of the location and surroundings by witnesses. *Hanford v. R. R.*, 167 N. C., 277; *Draper v. R. R.*, 161 N. C., 313; *Davis v. R. R.*, 136 N. C., 117; *Blue v. R. R.*, 117 N. C., 644. There was also evidence as to the speed of the train, its length and weight, and the condition of
(487) the track, all of which were competent as aids to the jury in arriving at the truth. *Draper v. R. R.*, 161 N. C., 312.

Exceptions 9 and 10 are to the refusal of nonsuit, which need not be discussed, for it is elementary that on such motion the evidence must be considered in the light most favorable to the plaintiff. *Gray v. R. R.*, 167 N. C., 435; *Hodges v. Wilson*, 165 N. C., 323; *Walters v. Lumber Co., ib.*, 388.

The real point in the case is as to the last clear chance, for the jury found the defendant guilty of negligence and the plaintiff's intestate guilty of contributory negligence. It is well settled that notwithstanding the plaintiff's intestate was negligent by being on the trestle, yet if the engineer by proper watchfulness could have discovered that he was in peril, he should use all reasonable precautions consistent with the safety of his train to avert the injury; and if he failed to do so the defendant is liable.

Though the original wrong or omission was that of the plaintiff, the injury should be imputed to the last wrong as the proximate cause, and not to that which is more remote. *Clark v. R. R.*, 109 N. C., 430. In

Arrowood v. R. R., 126 N. C., 631, where the plaintiff's intestate lay down on the track, and the engineer was hindered in keeping a proper lookout by reason of the winding track, the Court held that this was no excuse, because, if the engineer could not see the track by reason of the curve, the fireman should have aided in keeping a lookout; and if these two were not sufficient to maintain a careful lookout, then the defendant should have had a third man. The Court said, in that case, which has been cited many times since: "Notwithstanding a human being is down and helpless on the track, and is there in his own wrong, the railroad company acquires no right to run over and kill him for his foolhardiness, if by ordinary care it can be avoided. Even a cow or a hog does not forfeit its life under such circumstances, if the company's servants can by ordinary care avoid killing. If on this occasion, by reasonable, ordinary care, in keeping a lookout on both sides of a winding mountain road, whose curves would sometimes obscure the track from the sight of the engineer on the right-hand side of the engine, and did so obscure it at the point where the deceased was killed, and such defective lookout caused the killing, which might otherwise have been prevented, then, notwithstanding the negligence of the deceased, the defective lookout kept by the defendant was the proximate cause of the death."

In *Arrowood's case* the Court also said: "The railroad track is for the exclusive use of the company. It pays for its construction, and has, by virtue of a grant of the State's right of eminent domain, power to condemn from private owners the right of way 'for public uses,' but that use is to be exclusive in itself, subject, of course, to public regulation and control in its use. Others have no right to use the track, and when they do so they are guilty of contributory negligence, unless they (488) have permission, express or implied, from the company. The discussion whether the intestate was a licensee or a trespasser has no bearing upon this appeal by the defendant, for the jury found on the second issue that the intestate, whether he was a licensee or trespasser, was wrongfully on the track, *i.e.*, that he was guilty of contributory negligence."

In the leading case on this subject in North Carolina, *Pickett v. R. R.*, 117 N. C., 637, it was held to be the duty of an engineer to maintain a reasonably careful lookout along the track, and if by reason of his failure to do so an injury to a person on the track could have been averted notwithstanding the previous negligence of such person, then the negligence of the engineer is the proximate cause, and the company is liable.

It is equally well settled that when more than one inference can be drawn as to the negligence or proximate cause the case must be submitted to the jury. *Norris v. Mills*, 154 N. C., 483; *Holton v. Lumber Co.*, 152 N. C., 69.

There was evidence that the plaintiff's intestate could have been seen by the engineer, with reasonable diligence, for 150 yards, and that the train could have been stopped within that distance.

The defendant asked the court to charge: "If the boy, David Hopkins, saw the train approaching, and if he had time to get off the trestle, or could have done so in the exercise of ordinary care for his safety, but failed so to do, and was killed by reason of such failure on his part, then the jury will answer the third issue 'No.'" It is stated that this request was refused. But in the body of the charge the court instructed the jury: "These defendants have asked the court to charge, and it does charge, that if the jury find from the testimony that the plaintiff's intestate, David Hopkins, learned of the approach of the train which struck him when the train was 75 feet or more away, and that then, if he had exercised ordinary care to escape injury, he could have done so, the jury will answer the third issue 'No.'" This seems to be more favorable to the defendant than the prayer.

The court added, immediately after the above, the following: "Again if after the boy, David Hopkins, saw the train approaching he had time to get off the trestle, and could have done so in the ordinary exercise of care for his safety, but failed to do so, and was killed by reason of such failure on his part, then the jury will answer the third issue 'No.' That is their contention." We understand that the last four words mean that the court was giving this instruction in accordance with the defendant's contention. This instruction differs from the prayer above stated as refused in the insertion of the word "if." When the court gives substantially or more correctly a charge which is asked and refused, there is no error. But even if we are mistaken as to this being given, it was (489) not applicable to the third issue, but to the second issue, which the jury found in favor of defendants anyway.

Taking the entire charge of the court, it seems that the court assumed that the plaintiff's intestate was a trespasser. But there is uncontradicted evidence that this trestle had been used as a passway for a great many years, and if so, it was the duty of the defendant to keep a sharp lookout and give timely warning to prevent a collision.

In *Bogan v. R. R.*, 129 N. C., 156, the Court approved the following charge as in accordance with the unbroken line of authorities there cited and which have been followed since: "If the jury found from the evidence that the defendant's servants in charge of the engine either discovered or by exercising ordinary care might have discovered that the plaintiff was walking upon the trestle, and was so situated that she could not, without peril, owing to her position on the trestle and the length and height of the trestle, get off in time to escape the train, moving as it was, and that the defendant's servants in charge of the engine

could, by the exercise of ordinary care, have stopped the train and avoided the accident after seeing the plaintiff in a place of peril on the trestle, or after they should have seen her and failed to do so, and the plaintiff was injured thereby, they should answer the first issue 'Yes.'"

It is not very material, as was said in *Arrowood's case,* whether the deceased was a trespasser or a licensee. The jury found the third issue as follows: "Notwithstanding such negligence on the part of plaintiff's intestate, could the defendants by the exercise of due care and prudence have prevented the killing?" Answer: "Yes."

After full consideration of the whole case and the exceptions, we find No error.

Cited: Ingle v. Power Co., 172 N. C. 753 (3g); *Smith v. Electric R. R.,* 173 N. C. 493 (3g).

T. C. DICKEY ET AL. v. W. N. COOPER ET AL.

(Filed 22 December, 1915.)

Reformation of Instruments—Equity—Deeds and Conveyances—Mistake.

A deed will not be reformed for mutual mistake of the parties and the draftsman, in the absence of evidence that all of the parties thereto or the draftsman participated in the mistake alleged.

APPEAL by plaintiff from *Webb, J.,* at August Term, 1915, of CHEROKEE.

Civil action. At the conclusion of the evidence the court sustained a motion to nonsuit, and plaintiff appealed.

Dillard & Hill for plaintiffs.

M. W. Bell and Zeb Weaver for defendants.

BROWN, J. This action was brought to reform a deed so as to (490) include a tract of land containing 180 acres, being Tract No. 32, District 1, Cherokee County. The plaintiffs allege that they bought from the defendants the land known as the Mission farm, comprised of several tracts of land, including Tract No. 32, and paid for it, but that by inadvertence or mistake of parties and the draftsman the Tract No. 32 was omitted from the deed.

The defendants admit the sale to plaintiffs and execution of deed for the Mission farm, but deny that they ever agreed to sell Tract 32, and

deny that it is a part of the Mission farm, and deny that said tract was omitted from the deed by mutual mistake or the mistake of the draftsman. His Honor held that there is no sufficient evidence. We concur in this view.

There is some evidence that W. N. Cooper agreed verbally to sell the Tract No. 32, but none that the other defendants so contracted. There is no evidence that the tract was omitted from the deed by the mutual mistake of all the parties or of the draftsman. This renders it unnecessary to discuss the interesting question discussed on the argument, as to whether a court of equity will reform this deed based upon an oral contract so as to enlarge its subject-matter. *Davis v. Ely,* 104 N. C., 20.

Affirmed.

Cited: Crawford v. Willoughby, 192 N. C. 272 (g).

WILLIE P. COOPER, BY NEXT FRIEND, v. THE SOUTHERN RAILROAD COMPANY AND E. FULLER.

(Filed 22 December, 1915.)

1. False Imprisonment—Malicious Prosecution—Arrest — Corporations — Principal and Agent—Criminal Law.

An action for damages for false arrest and malicious prosecution will lie against a railroad company for the acts of its agents and employees done within the scope of their employment, without the necessity for plaintiff to show special authority from or ratification of such acts by the company.

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

In an action for damages for false arrest and malicious prosecution against a railroad company there was evidence that the arrest was caused to be made by its shop superintendent, who had authority over the property—shop, yards, men at work—upon the charge that the accused feloniously entered the company's toolhouse, etc.; that private officers of the company, generally employed for such purposes, assisted in his prosecution before a justice of the peace, etc., before whom he was convicted, but afterwards acquitted in the Superior Court, etc.: *Held,* sufficient evidence of the authority of the company's employees to sustain a verdict rendered against the defendant company.

3. False Imprisonment—Malice—Evidence—Declarations—Res Gestæ.

In an action for false arrest and malicious prosecution against a railroad company, whose private detective took the accused to jail upon conviction before a justice of the peace, a declaration of the detective tend-

ing to show malice, while so acting, is part of the *res gestæ*, and is competent evidence upon the trial.

4. Evidence—Witnesses—Stenographer's Notes—Deceased Persons—Declarations.

The official stenographic report of the entire testimony of a witness, since deceased, taken at a former trial, and its correctness testified to by the stenographer, is properly received as evidence on a subsequent trial, and is not objectionable as to its form or as declarations of a deceased person.

APPEAL by defendants from *Lane, J.*, at August Term, 1915, of (491) CABARRUS.

Civil action to recover damages for false arrest and malicious prosecution, based upon evidence on part of plaintiff tending to show that said plaintiff, a boy of 16 years of age, was in the employ of the railroad company as night supply boy at Spencer railway shops; that defendant Fuller was shop superintendent, had control of everything around the shops, and was charged with the duty of the care and custody of the shops and the property of the company connected therewith; that, at the instance of said Fuller and two local private policemen of the company, the plaintiff was charged with feloniously entering the toolhouse of defendant company at Spencer, N. C., about 10 July, 1910; was arrested on a warrant, tried before a justice of the peace, and imprisoned for a time, and, on appeal to Superior Court, was again tried and acquitted by the jury; that such arrest was wrongful, malicious, and without probable cause.

There was denial of liability on the part of both defendants; denial of any express or implied authority to Fuller to act for the company in the matter, and also evidence tending to show probable cause for the acts of Fuller and his assistants.

On issues submitted there was verdict for plaintiff against both defendants. Judgment on the verdict, and the defendants excepted and appealed.

H. S. Williams and J. Lee Crowell for plaintiff.

L. C. Caldwell for defendant.

HOKE, J. This case was here on a former appeal of defendants from a verdict and judgment in favor of plaintiff, and a new trial was granted because the court below had improperly allowed an amendment to complaint material to the relief sought and used to defendant's prejudice after the evidence was all in and counsel for plaintiff was addressing the jury and when there had been no testimony offered in support of the additional allegations. See case reported in 165 N. C., pp. 578 and

(492) 581. In the opinion, delivered by *Associate Justice Brown,* it was held that the warrant of the justice of the peace, sued out at the instance of the individual defendant, Fuller, and under which plaintiff was arrested, tried and imprisoned, was void on its face, and afforded no protection to said Fuller, and the case was sent back to be tried again on the issue principally whether the defendant company had authorized the suing out the warrant or had ratified the same. See opinion, p. 582.

This opinion having been certified down, another trial was had, and, on verdict and judgment in plaintiff's favor against both defendants, the present appeal is prosecuted.

It was chiefly urged before us that the case against the company should have been nonsuited because there was no evidence to fix responsibility on the company for the acts of the individual defendant, on the authority of *Daniel v. R. R.,* 136 N. C., 517, and cases of like purport. In that well considered opinion by *Associate Justice Walker* it was held that the cashier of a local railroad office had no implied authority from the company to sue out a warrant and cause the arrest of one suspected of stealing money from the office of the company, and there being no evidence of express authority or of ratification, a recovery against the company was denied; but that case bears very little or no resemblance to the facts presented on this record, the evidence on the part of plaintiff tending as it does to show: "That the defendant Fuller was shop superintendent of the railroad and had authority over the railroad property—shop, yards, the men at work—and had charge of everything around there. He was with the company when witness began to work first, and was in charge of everything." And, further, when plaintiff was taken by Fuller before the justice of the peace, "there were present two private officers of the railroad company, men employed by the company to look after the property, catch hoboes and trespassers for stealing. They had been arresting people who had trespassed or stolen, and doing this ever since witness had been there." These men assisted at the prosecution of plaintiff before the justice, and one of them took him to jail. Here was ample evidence that both Fuller and these assistants were acting within the course and scope of the authority vested in them by the company, and, if accepted by the jury, justified fixing on the company responsibility for their acts. *Cooper v. R. R.,* 165, *supra,* and *Sawyer v. R. R.,* 142 N. C., 1.

And the same answer may be made to defendant's exception that the court refused to charge, as requested, that the company could not be made responsible unless they expressly authorized the particular act complained of, namely, swearing out this warrant, etc. In *Sawyer's case* the principle applicable is correctly stated as follows:

"1. Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That

the conduct complained of necessarily involved malice, or was beyond the scope of corporate authority, constitutes no defense to (493) their liability.

"2. Where the question of fixing responsibility on corporations by reason of the tortious acts of their servants depends exclusively on the relationship of master and servant, the test of responsibility is whether the injury was committed by authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it."

And in the opinion the Court quotes with approval from Wood on Master and Servant, sec. 307, as follows: "The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof and were such as may fairly be said to have been unauthorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act is such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders."

Under this well recognized principle it was not necessary, therefore, to show "express authority for the particular act," as the evidence of plaintiff, which has been accepted by the jury, was amply sufficient to establish that the acts complained of were well within the scope of the authority of Fuller and his assistants.

It was further objected that the conversation of one of the detectives, when taking plaintiff to the jail, having some tendency to show malice, was received in evidence. This was a declaration while the declarant was engaged in the very act complained of, and, under our decisions, was properly admissible as part of the *res gestæ*. *Stanford v. Grocery Co.*, 143 N. C., 425; *Merrell v. Dudley*, 139 N. C., 57.

In *Merrell's* case it was held: "In an action for malicious prosecution, the declarations of defendant at the time he sued out the warrant of arrest, and accompanying that act, are competent as part of the *res gestæ*," etc.

Again, it was urged for error that the evidence of a witness, Mrs. Pickett, examined as such at the former trial, and since deceased, was received in evidence and put before the jury through the official copies of the notes of the court stenographer, taken and written out in the course of her duty. The objection, as made on the argument, is hardly open to the defendant, as the record shows defendant only excepted "to the competency of the dead witness's evidence," and not to the form in which it was presented. In that aspect the evidence, purporting to be the entire testimony of the witness as it was given at the former trial, was clearly admissible. *Grant v. Mitchell*, 156 N. C., pp. 15 and 18;

Wright v. Stowe, 49 N. C., 516. But in respect to the form, the notes taken and copied by the stenographer in the course of her official (494) duty and spoken to in her testimony as the evidence of Mrs. Pickett, the deceased witness, as delivered at the former trial, was properly received, and, in our opinion, was a very satisfactory form in which the evidence of a deceased witness may be presented. In some jurisdictions the admissibility of the official notes of a court stenographer is provided for by statute; but, in the absence of any statute, where such notes and copies thereof are properly authenticated, that is, identified and testified to as containing a correct statement of the deceased witness, and substantially his entire testimony, the notes or copies thereof may properly be received.

The position and the principles upon which it rests have been recognized in several decisions of this State, and well considered authority elsewhere is in full support of his Honor's ruling. *Carpenter v. Tucker,* 98 N. C., pp. 316-319; *Ashe v. DeRossett,* 50 N. C., 299; *Jones v. Ward,* 48 N. C., 24; 1 Elliott on Evidence, sec. 515; McKelway on Evidence (2 Ed.), p. 293; 16 Cyc., p. 1108.

Speaking to the subject in Elliott on Evidence, sec. 515, the author quotes with approval from a well considered case as follows: "The real objection to such evidence (that is, the testimony of a witness on a former trial) is that it is only the testimony of someone else as to what the witness swore to on a former trial; and before the day of official reporters in our trial courts the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official court stenographer this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition taken out of the State would be. Rules on such subjects should be practical, and subject to modification as conditions change." *Minneapolis Mill Co. v. R. R.,* 51 Minn., 304, 314.

On careful examination of the record, we find no error giving defendants or either of them any just ground of complaint, and the judgment for plaintiff is affirmed.

No error.

Cited: Bank v. Whilden, 175 N. C. 54 (4g); *Crews v. Crews,* 175 N. C. 173 (4g); *Cotton v. Fisheries Products Co.,* 177 N. C. 59 (1f); *Clark v. Bland,* 181 N. C. 112 (1g); *Strickland v. Kress,* 183 N. C. 537 (1g); *Elmore v. R. R.,* 189 N. C. 672 (1f, 2g); *Barbee v. Cannady,* 191 N. C. 535 (4f); *Ferguson v. Spinning Co.,* 196 N. C. 616 (1b); *Dicker-*

son v. Refining Co., 201 N. C. 100 (1f, 2g); *S. v. Kiziah*, 217 N. C. 404 (4g); *Hammond v. Eckerd's*, 220 N. C. 601 (1b).

(495)

W. V. HOWARD v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 December, 1915.)

1. Issues—Contributory Negligence—Evidence—Telegraphs.

Upon the delivery of a telegram to the agent of a telegraph company, properly addressed as to the sendee and town, the agent asked for a better address, and was told by the sender he could give the street address but not the number of the residence. There was conflicting evidence as to whether the sender said "East McBee Avenue at 111" or "East Avenue, 113." The sendee was a white man well known in the town, and the message was delivered to a negro by the same name, at a widely different number of house. The sender of the message afterwards offered in time to supply the correct and definite address, but the agent at the receiving point told him the message had been delivered: *Held*, it is the duty of a telegraph company to deliver a telegram with reasonable promptness when it is correctly addressed, and under the evidence in this case an issue as to contributory negligence was erroneously submitted to the jury.

2. Trials—Attorneys—Arguments of Law.

It is reversible error for the trial judge not to permit attorneys to argue the law to the jury and to apply therein the decisions of the Court (Revisal, sec. 216); though the facts may not be read in evidence.

3. Judgments—Issues—Contributory Negligence.

Where in an action to recover of a telegraph company damages for mental anguish the trial court has erroneously submitted an issue as to contributory negligence, which the jury found in the affirmative, but assessed the damages under the third issue, the Supreme Court will not set aside the erroneous issue and give a judgment for the damages assessed, for the finding as to contributory negligence had the effect of reducing the amount of damages in the consideration of the jury.

4. Appeal and Error—Rules Supreme Court—Printed Records.

Rule 29, as to the size, style, type, etc., of the transcript on appeal, is for the purpose of preserving them in bound volumes of uniform size, for the use of the Court, and must be complied with. On this appeal the appellant is not permitted to recover the cost of his transcript which is not printed in compliance with the rule.

WALKER, J., concurring; BROWN, J., dissenting.

APPEAL by plaintiff from *Cline, J.*, at March Term, 1915, of SWAIN.

This action is for damages for failure to deliver the following message which was handed by the plaintiff to the defendant's operator at Bryson

City, N. C., addressed to his son-in-law, John Edwards, Greenville, S. C.: "Your wife's mother dead. Come. Answer at once." This message was received by defendant's agent at Bryson City, 2:52 p.m., 24 March, 1913, and was delivered to a Negro named John Edwards at 4:10 the same afternoon.

When the message was handed to the agent the only address on it was "John Edwards, Greenville, South Carolina." The agent asked Howard if he could give him some better address, and Howard stated that
(496) he could give him the street address but not the number of the residence. Howard and other witnesses say that he told the agent "East McBee Avenue at 111," and the agent testifies that Howard told him "East Avenue 113." The telegram was never delivered to the sendee, John Edwards, and neither he nor his wife had opportunity to attend the funeral.

About two hours afterwards Howard went back to the depot and inquired whether the message had been delivered, and asked the agent to ascertain, offering to pay, but the agent told him that he would find out free of charge. Later in the evening Howard again went to the agent, saying that he was afraid something was wrong, and wanted to send another telegram, but the agent told him that he had tried twice to get an answer to his service message, but could not get it. When Howard left Bryson City the agent promised him that if he heard anything before Martin's store was closed at Noland, near which place the plaintiff lived, he would phone Howard; but no message had been received when he arrived at Noland. When Howard reached home he looked up the address of John Edwards and sent his brother next morning to Bryson City to send another telegram. But on his brother reaching Noland, the agent had phoned that the message had been delivered at 4:10 on the evening before. Howard made no further effort to send a message to his daughter and son-in-law, but kept his wife's body until 5 p.m., 26 March, and then buried her.

The jury found that the defendant was guilty of negligence, but that the plaintiff was guilty of contributory negligence, and assessed the damages at $50.

Frye & Frye for plaintiff.

A. S. Barnard and Albert T. Benedict for defendant.

CLARK, C. J. The plaintiff excepts because the court submitted, over his objection, the following issue: "Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?"

There was no evidence which should have been submitted to the jury upon the issue of contributory negligence. In *Hocutt v. Tel. Co.*, 147

N. C. 190, where the plaintiff delivered a message to the defendant addressed "Greensboro, N. C.," *Associate Justice Walker,* in speaking of the duty of the plaintiff in such case, uses this language: "Mrs. Hocutt was not bound to do more than she did when she caused a properly addressed message to be delivered to the defendant's operator and tendered the charges for transmission. The duty then devolved upon the defendant to send and deliver the message to the addressee unless it had some legal excuse for not doing so, and none appears in this case." Anything the plaintiff did further than that in this case was in trying to aid the defendant in the performance of its duty. From (497) the conversation which took place between the agent and the plaintiff, as testified to by DeHart, the agent knew that the plaintiff did not know the full address of Edwards.

The plaintiff was a white man, and yet the telegram was delivered to a Negro, and not at 113 East Avenue, much less on East McBee Avenue. The agent at Bryson City prevented the plaintiff sending a second message that same afternoon and also prevented him from sending a message with full street address by his brother the next morning when he phoned to Noland that the message had been delivered at 4:10 p.m. the day before. There was also evidence that John Edwards was at home in Greenville that afternoon; that he had lived in Greenville about two years working on buildings; that his address was filed at the post office; that he received his mail every day; that his parents lived in the same house with him; that his father was also well known in the town, and that if he had received the telegram he and his wife would have attended the funeral.

The court erred in refusing to permit the counsel to argue that the ruling in *Cashion v. Tel. Co.,* 123 N. C. 267, applied to this case. Revisal, 216, provides that in jury trials counsel may argue the law as well as the facts to the jury. This is entirely distinct from the instances in which the court has refused to permit counsel to read the facts in one case as evidence in another. There were other errors, which we need not discuss, as they may not occur on another trial.

The defendant insists that we should disregard the error in submitting the issue of contributory negligence and affirm the verdict of $50. But to do so would ignore the fact that the finding on this issue, even if there was no other error, militated to reduce the amount of the damages.

We cannot be inadvertent to the fact, however, that the appellant in printing the transscript did not comply with Rule 29, which requires that the transcript on appeal shall be printed "in the same type and style and pages *of the same size* as the Reports of this Court." This requirement is because all printed briefs and records are bound for preservation in volumes of uniform size, and a failure to observe this rule is incon-

venient. By reason of this failure to observe the rule, the appellant will not be allowed to tax the cost of the transcript as a part of his costs in this Court. The Rules of the Court are only such as are necessary, and they must be observed.

For the errors stated there must be a

New trial.

WALKER, J., concurring: There is some confusion in this case, arising from the issues submitted to the jury, but I will assume that the
(498) answers to the first two issues mean that the telegram was delivered to the operator without any street address, and at his instance and request the party who delivered for transmission gave him the street address as 113 East Avenue instead of 113 East McBee Avenue, as intended by plaintiff, though it is quite certain, if all the evidence is to be believed, that the message as delivered to the operator contained no street address, and that the person who delivered it to him did not *volunteer* any information in regard to it. Even upon this assumption, I think that the defendant was negligent in handling the message, upon its own showing, and if any negligence is imputable to the plaintiff it was not the proximate cause of the injury. The message was received at Greenville and called for a delivery to John Edwards at 113 East Avenue. There was some delay in making any kind of delivery, correct or incorrect, and the senders of the message were inquiring at the other end of the line as to the cause of the delay and wanted to find and give to the operator there the correct address, which was 113 East McBee Avenue, but the operator virtually declined to receive it, even though he may have been partially justified by the neglect of the Greenville operator to wire back for a better address. There was, therefore, negligence at the initial office in not accepting the proffered information, or at the terminal office in not asking for a better address, and it makes little difference at which place it occurred. I incline to the view that there was negligence at both ends of the line, but I will consider for a moment that which occurred at Greenville. The negligence of the messenger there was of course that of the company, as he was its chosen agent to perform the important act of delivery. He had a message addressed to John Edwards at 113 East Avenue, and he could not be found at that address. This would naturally suggest to a man of ordinary intelligence and prudence that there was something wrong with the message, and should have called for some report by him to the office where he received the message and some inquiry by the operator there as to the reason for this evident mistake. If it had been made, the correct address would have been given, as the testimony shows that it was known at the place where the death occurred. But this was not done, no service mes-

sage being sent to the sending station for further and more certain information.

The messenger had no more right to deliver it to a person having the same name at the wrong address—No. 2 East Avenue, a long distance from No. 113 on the same avenue—than he had to deliver it to a person by the wrong name at the right address, there being no person of the same name there. We have held that where anything takes place in the course of the delivery to arouse suspicion or raise a doubt as to the correctness of it, or, in other words, when the address and the delivery proposed to be made do not correspond, the company should (499) wire back for a better address. This brings the case within the principles settled by the numerous decisions of this Court. *Hendricks v. Tel. Co.*, 126 N. C., 304; *Lyne v. Tel. Co.*, 123 N. C., 129; *Hinson v. Tel. Co.*, 132 N. C., 460; *Woods v. Tel. Co.*, 148 N. C. 1; *Medlin v. Tel. Co.*, 169 N. C., 495.

In *Sherrill v. Tel. Co.*, 117 N. C., 352, it was held to be the duty of the operator to wire back for a better address in case of doubt, and it was no excuse that he supposed he had all the information obtainable. We have just said in *Medlin's case, supra:* "If the defendant was in doubt or unable to deliver the message, its plain duty, as often decided by the Court, was to wire back to Charlotte for a better address, and it would have been forthcoming, as the sender had left both his phone and street address, for the very purpose, with the operator there. S. C. McCall, who had delivered the message at Charlotte to the defendant for transmission, knew the sendee well, and, of course, her sister, Mrs. Jonas, could have given a fuller and more accurate address if one was required. It was clear negligence not to have sought this information by a service message to Charlotte. *Hendricks v. Tel. Co.*, 126 N. C., 311, 35 S. E., 543; 78 Am. St. Rep., 658; *Hoaglin v. Tel. Co.*, 161 N. C., 395; 77 S. E., 417; *Ellison v. Tel. Co.*, 163 N. C., 5; 79 S. E., 277, and cases cited at page 13."

Defendant was also liable for having notified the sendee that the message had been truly delivered when it had not been. *Laudie v. Tel. Co.*, 126 N. C., 431.

It occurs to me that this case is fully as strong for the plaintiff as several we have decided against this company in which the negligence was not so gross as it is shown to be here. Where the message is not delivered because of a deficient address, there may be some excuse for the defendant, but where it is guilty of a positive wrong in knowingly delivering it at the wrong place, there is much less, if any.

As to the contributory negligence, it was aptly said in *Cogdell v. Tel. Co.*, 135 N. C., at p. 438: "While the issue of contributory negligence was found in favor of the plaintiff, we feel compelled to say that in

cases like the present we see no room for its application. The only negligence possibly imputable to the sendee is that of the sender in misspelling her name. This act of negligence was entirely antecedent to the negligence of the defendant, and in no sense concurrent therewith. Moreover, the defendant got the full benefit of that defense under the instructions as to the doctrine of *idem sonans*. If the dissimilarity in spelling were so great as to render it practically impossible for the defendant to identify the addressee after the exercise of due diligence, then there would be no negligence on the part of the defendant, and consequently neither occasion nor necessity for the defense of contributory negligence.

(500) If, on the contrary, the defendant could by the exercise of reasonable diligence have identified the sendee and delivered the message, in spite of the previous negligence of the sender in misspelling the name, it could not set up such antecedent negligence in bar of recovery." So, here, the negligence attributable to plaintiff, if any, occurred before the message reached Greenville, S. C., and that which really caused the injury was the failure of the defendant, by itself or its messenger, to attach proper importance to the fact that its delivery was at the wrong street number, and either to wire back for a better address or make further inquiry for the true address. There was evidence that he could have been found by inquiry at the post office. The addressee had lived in Greenville about two years, had registered his name at the post office and received his mail there. In *Woods' case, supra,* the address was 38 Depot Street, whereas the addressee lived in the rear of 83 Depot Street, a wide departure from the correct address, and this Court held that the failure to examine the city directory, where his name and street address could be found, or to inquire at the post office (*Lyne v. Tel. Co.*), where he received his mail, was evidence of negligence, and we stated the rule to be that, notwithstanding a misdirection of the message, it is the duty of the company to make reasonable inquiry and to exercise that degree of care which a prudent person would use, under the circumstances, in the effort to deliver it. The messenger knew he was at the wrong place, and yet did not wait to inquire of the Negro man to whom he handed the message if he was the proper addressee. It is surprising that such a course was not taken, as the man could have given the information as soon as he had seen the contents of the message. This would seem, of itself, to be gross negligence, and the real, last, and efficient cause of the nondelivery to the proper addressee, especially when the messenger had been put on his guard by the fact that he was not at the right street number, but far away from it.

There was an error in the charge as to damages. I do not see why mental anguish should stop at the grave. It may continue long after the interment, and if it does, and the negligence is its proximate cause,

there is no sound reason for denying a recovery of damages for it. A man's mind may suffer as well as his body, and we cannot fix a limit to the one any more than we can to the other, and not as well to the anguish of the mind as to that of the body. The doctor said to Macbeth (not quoting literally), that he could not minister to a mind diseased, nor pluck from the memory a rooted sorrow, nor raze out the written troubles of the brain, nor had he any sweet oblivious antidote to cleanse the stuffed bosom of that perilous stuff which weighed upon the heart, for therein the patient can only minister to himself. It was this confession of deficiency in medical skill that caused Macbeth to reply: "Throw physics to the dogs. I'll none of it." We cannot measure the mental damage as well as we can the physical, for the latter is seen and cannot (501) easily be simulated; but that it may and does exist, and is a reality, we know, and for it the law awards compensation, and should do so, just as much as it does for physical pain. It should be cautiously done, because it is so easily feigned; but that is no reason why, when it is found to exist, it should be limited any more than bodily suffering.

BROWN, J., dissenting: I see no error committed upon the trial of the issue as to damages. If there was error in submitting the issue as to contributory negligence, that issue should be set aside and judgment directed for the plaintiff for the sum assessed under the issue as to damages.

There are cases in our Reports against railroad companies where the findings upon issues of negligence and contributory negligence have been set aside and new trials awarded upon those issues when the finding as to damages was left standing. Therefore, I see no reason why this issue of contributory negligence should not be eliminated and judgment rendered for the $50 damage assessed.

Cited: Edwards v. Perry, 210 N. C. 28 (2d); *S. v. Buchanan,* 216 N. C., 712 (2d); *Roediger v. Sapos,* 217 N. C., 100 (2g).

TOM QUEEN v. THE GLOUCESTER LUMBER COMPANY.

(Filed 22 December, 1915.)

Judgment—Excusable Neglect—Attorney and Client.

A party litigant must give his case the attention that a man of ordinary prudence would give his important business affairs; and where a defendant has employed one of a firm of attorneys nonresident of the

county wherein the case was pending, who had sole charge of his interest in the case, and soon after filing the answer this attorney died, of which the defendant had knowledge, and neglected to employ another attorney for seven months, and after an intervening term judgment was obtained against him, he may not have the judgment set aside for excusable neglect upon the ground that the deceased attorney had failed in his promise to employ local attorneys to represent him, and that he was not informed or did not know that the case had been set on the calendar for trial.

APPEAL by defendant from *Webb, J.*, at July Term, 1915, of HAYWOOD.

This is a motion to set aside a judgment upon the ground of excusable neglect. His Honor, before whom the motion was heard, found the following facts:

The summons herein issued on 11 April, 1913, returnable to September Term, 1913, of the Superior Court of Haywood County, which convened on the eighth Monday before the first Monday of said month, and
(502) the same was duly served upon the said defendant by the sheriff of Transylvania County on 18 April, 1913. That thereafter, to wit, on 24 April, 1913, the complaint in said action was duly filed in the office of the clerk of the Superior Court of Haywood County and a copy thereof was immediately furnished by counsel for plaintiff to Zachary & Clayton, of Brevard, North Carolina, counsel for the defendant. That thereafter, to wit, on 17 July, 1913, the said Zachary & Clayton filed the answer of said defendant in said office of the clerk of the Superior Court of Haywood County. That immediately after the said answer was filed the said Zachary, of the firm of Zachary & Clayton, became ill and was not allowed to perform any professional work, and died about 20 October, 1913. That the said Zachary, of the firm of Zachary & Clayton, had had immediate charge of said action for the defendant from the time of its institution until the answer was filed therein, 17 July, 1913, and that the said Clayton of said firm had no connection with said cause other than to do some clerical work therein, and was not continued as counsel for the defendants after the death of the said Zachary.

That the regular term of the Superior Court of Haywood County was duly held in said county in January and February, 1914, but said cause was not placed upon the calendar for trial at said term. That the same was placed upon the calendar for trial at May Term, 1914, of said court, at which time it was tried before *Carter, J.*, and a jury, and verdict and judgment were rendered in favor of the plaintiff in the sum of $156.56, with interest thereon from 1 April, 1912, as appears in the record.

It is further found as a fact that no calendar of the causes set for trial at the said May Term, 1914, of said court was furnished the defendant.

It is further found that the defendant did not employ counsel to attend the said cause after the said Zachary became sick in July, 1913, until some time in March, 1915, when the sheriff of Transylvania County notified the defendant that he had in his hands an execution issued from the Superior Court of Haywood County on said judgment against the property of the said defendant.

The motion was denied, and the defendant excepted and appealed.

Alley & Leatherwood for plaintiff.
Welch Galloway, A. S. Barnard for defendant.

ALLEN, J. The defendant has shown no reasonable excuse for its negligence in failing to defend the action and to prevent the recovery of judgment.

The frequent admonition, that "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. Insurance Co.,* 149 N. C., 36; *Lunsford v. Alexander,* 162 N. C., 530), has not been heeded, nor has the defendant measured up to the degree of diligence required in the orderly conduct (503) of an action in court.

"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." *Allen v. McPherson,* 168 N. C., 437.

In this action the defendant employed counsel who was not a resident of the county where the action was pending, and its excuse for not being present at the trial is that it relied upon his promise to employ local counsel and to inform it of the time of trial. This would not ordinarily justify the defendant in giving no further attention to the matter, but if permitted to prevail, in the absence of other facts, as ground for setting aside the judgment, it appears from the findings of fact that the counsel who had been employed became ill in July, 1913, immediately after the answer was filed; that he was not thereafter able to attend to any business, and that he died in October, 1913, and that during seven months intervening between the death, which was known to the defendant, and the recovery of judgment the defendant made no effort to employ other counsel and took no steps to defend the action.

Would any man of ordinary prudence employ an agent to attend to important business in his absence, and, after hearing of his death, delay seven months to appoint another agent or to inquire what had become of his business interest?

We think not, and if this would be inexcusable negligence in the ordinary affairs of life, the degree of care is not less when one is called upon

to defend an action in the courts. *Vigilantibus et non dormientibus jura subveniunt.*

Affirmed.

A. S. PATTERSON ET AL. AND THE BOARD OF HIGHWAY COMMISSIONERS v. THE BOARD OF COMMISSIONERS OF SWAIN COUNTY.

(Filed 22 December, 1915.)

Road Districts—Bond Issues—Disputed Highways—County Commissioners—Statutes.

Chapter 193, Public-Local Laws 1915, created a board of highway commissioners for certain townships of Swain County, authorizing them to construct a designated trunk highway and feeder roads, etc., and use the proceeds of a certain bond issue for the purpose: *Held*, the erecting, repairing, and maintaining all public bridges and culverts in the county not upon the trunk line or branches in course of construction are within the duties of the county commissioners, and not within the duties or subject to the control of the highway commissioners.

(504) APPEAL by defendant from *Webb, J.*, at July Term, 1915, of SWAIN.

Controversy without action. The court rendered the following judgment and findings of fact:

This cause coming on to be heard before his Honor, James L. Webb, judge, holding the courts of the Twentieth Judicial District of North Carolina, at the July-August Term of the Superior Court of Swain County, upon agreed state of facts as provided for under section 803 of the Revisal of 1905, and after a partial hearing of the said cause, by agreement of counsel for plaintiffs and defendants said hearing was continued, to be further heard and concluded and judgment signed by the undersigned at Murphy, Cherokee County, upon the briefs and further argument of counsel submitted.

After hearing the considering said cause and the briefs and argument of counsel, the court finds the following facts:

1. That the General Assembly of North Carolina at its session of 1915 passed a special act establishing a road district in Swain County comprising the townships of Charleston, Nantahala, and Ocona Lufty, and appointing nine highway commissioners, incorporating said body under the name and style of "The Board of Highway Commissioners of Swain Road District," and vesting in said commissioners the control and supervision of all public roads and ways in said road district, and enjoining upon them the duty of first constructing a through trunk-

line highway extending from Bryson City to the Macon County line and from Bryson City to the Jackson County line, through said special road district; that after said trunk-line highway has been provided for, said highway commissioners were authorized and empowered to use any funds still remaining in their hands to construct branch or feeder roads connecting with said trunk-line roads.

2. That said highway commissioners were authorized and empowered out of the road funds in their hands to construct all necessary bridges and culverts on said trunk-line road or such branch roads as they might build in said district.

3. That the said board of highway commissioners was empowered by said act to issue and sell bonds for the purpose of securing funds to construct said roads.

4. That no authority was given said board of highway commissioners under said special act to use any funds arising from the sale of bonds for maintaining or repairing existing roads or bridges in said road district or other parts of Swain County, and no provision was made by said act for any other funds to be used for such purposes.

5. That no authority or control was given said board of highway commissioners by said special act over any bridges or culverts not situated on the trunk-line road or branch roads provided for by said act, and that the control and upkeep of all such bridges and culverts (505) still remain in and devolve upon the board of county commissioners of Swain County as provided for under the general law.

Upon the foregoing findings of fact it is adjudged by the court that the board of county commissioners are charged with the duty of erecting, repairing, and maintaining all public bridges and culverts in Swain County which are not situated upon the line of the trunk-line highway or branch roads in course of construction by the highway commissioners, and that said highway commissioners have no duty in regard thereto or control thereover.

It is further ordered and adjudged that the board of county commissioners immediately assume supervision and control over all said bridges and culverts and to provide for the repair and maintenance thereof, and that the cost of erecting, maintaining, and repairing said bridges is declared to be a general county charge, to be paid for out of the general county funds available in the hands of the county commissioners not dedicated to any special purpose. JAMES L. WEBB,

Judge Holding the Courts of the 20th Judicial District.

The defendants appealed.

Bryson & Black for plaintiffs.

Franklin & Fisher for defendants.

BROWN, J. We are of opinion that the judgment of the Superior Court is a correct construction of the act of the General Assembly, chapter 193, Public-Local Laws 1915, and said judgment is

Affirmed.

AMY S. EWBANK v. A. J. LYMAN AND WIFE, JULIA E. LYMAN.

(Filed 22 December, 1915.)

1. New Trial—Limitations of Actions—Appeal and Error.

A new trial for error committed will not be granted on appeal unless it will serve a good purpose; and when it appears that the statute of limitations has been properly pleaded and from the admitted facts the cause of action is therein barred, it will not be granted on plaintiff's behalf.

2. Limitation of Actions—Fraud—Discovery—Statutes.

Applying Revisal, sec. 395, subsec. 9, to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, the provision that "the cause of action is not deemed to have accrued until the discovery by the aggrieved of the facts constituting the fraud," by correct interpretation is held to mean until the impeaching facts should have been discovered in the exercise of reasonable business prudence.

3. Same—Constructive Notice.

While the mere registration of deed to lands from a husband to his wife will not usually be imputed for constructive knowledge that it was done in fraud of the husband's creditors, it may be otherwise regarded when taken in connection with other relevant circumstances, as where the deed has been registered for elevn years in the proper county before the institution of the action; that plaintiff had foreclosed her mortgage securing her demand, but with partial results; the defendant had renewed his obligation to her several times, being unable to pay it; that there were numerous encumbrances on his property, and that she had visited the county for the purpose of investigation and had full opportunity of ascertaining the facts, all of which occurred a long time prior to the three-year period prescribed by Revisal, sec. 395, subsec. 9; and under the circumstances of this case it is held that the failure of the plaintiff in not sooner investigating the records was such negligence as will be imputed to her for knowledge, and bar her cause of action.

4. Limitation of Actions—Nonresidents—Statutes.

Revisal, sec. 396, refers to the absence of the debtor from the State, and the statute of limitations does not apply to him for the reason that he is not within the jurisdiction of the court and its process. Therefore a nonresident creditor who seeks to set aside a deed of his debtor for fraud is not excused by his absence for not complying with the provisions of Revisal, sec. 395, subsec. 9, requiring that he must bring his action within three years from the discovery of the fraud.

EWBANK *v.* LYMAN.

APPEAL by plaintiff from *Webb, J.*, at January Term, 1915, of (506) BUNCOMBE.

Civil action to set aside a deed on the ground of fraud, made by A. J. Lyman to his wife and codefendant, and subject the property conveyed therein to the payment of a judgment held by plaintiff against said A. J. Lyman.

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

Bourne, Parker & Morrison and T. F. Davidson for plaintiff.

Jones & Williams for defendant.

HOKE, J. We consider it unnecessary to refer to several of the interesting questions presented on the argument, being of opinion that, on the evidence, in any aspect of it, the plaintiff's cause of action, if she had one, is barred by the statute of limitations; and the statute having been properly pleaded and the admitted facts showing that plaintiff's claim is barred, as stated, it would serve no good purpose to grant a new trial, and the judgment of nonsuit must be affirmed.

The conditions under which the principle is applied and the limitations upon its operation will be found discussed in *Oldham v. Rieger,* 145 N. C., pp. 254 and 259; *Cherry v. Canal Co.,* 140 N. C., 422; *Shackelford v. Staton,* 117 N. C., 73, and the basic reason for the course indicated is stated in *Cherry's case,* quoting in part from 2 Am. and Eng. Pl. and Pr., p. 500, as follows: "This system of appeals is founded on public policy, and appellate courts will not encourage (507) litigation by reversing judgments for technical, formal, or other objections which the record shows could not have prejudiced the appellant's rights." The decided cases in this and other jurisdictions support this position. In *Butts v. Screws,* 95 N. C., 215, *Ashe, J.*, for the Court, says: "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." See, also, *Ratliff v. Huntly,* 27 N. C., 545; *Fry v. Bank,* 75 Ala., 473.

It may be well to note that, in *Oldham's case, supra,* where the Court declined to act on the principle, the statute of limitations had not been pleaded, and the facts upon which its application depended were in dispute between the parties.

Recurring, then, to the record, it appears from evidence offered by the plaintiff that on 7 May, 1895, A. J. Lyman, male defendant, executed to his wife a deed conveying a large amount of real estate in and near the city of Asheville, being the property which plaintiff seeks to subject to payment of his claim, for a recited consideration of $18,000, which deed was then duly acknowledged and registered; that later, in

1898, said A. J. Lyman executed another deed to his wife for a recited consideration of $5, purporting to confirm the former deed. It further appeared that, in December, 1892, plaintiff had loaned defendant A. J. Lyman $1,000, taking his note therefor, secured by deed of trust on real property, and this having been foreclosed and the property bought in by plaintiff at $200, she instituted suit against her debtor and, at December Term of Buncombe Superior Court, 1897, recovered judgment for the balance due on her note, $881.16, with interest from August, 1897, and same was docketed in said county, and no part of it had been paid; that about the time of the rendition of plaintiff's judgment and prior to that time said A. J. Lyman was embarrassed with debt and much of his property encumbered by mortgages and liens to different parties, and that this was known to plaintiff's representatives and agents and, to some extent, to plaintiff herself. Speaking to her debt and her dealings with defendant, plaintiff, among other things, testified as follows: "That she lived in Greenville County, South Carolina, in 1892, and in Greenville, S. C., in 1895; that she has been living there ever since, and is the plaintiff in this case; that she first learned of the deed made by A. J. Lyman to his wife on 18 August, 1904; that she went up to look at the property some time before that, but cannot recall the date; that Lyman was to pay this debt of hers the year after witness loaned the money, but he continued to ask for extensions; he asked her to renew it; he asked for the extension because he wished to keep it on there, he wished to keep the money; and asked witness to let him have it on 6 per cent; he could not pay it, and still kept it; that he has never paid it, and it was necessary for witness to foreclose the deed in
(508) trust and she obtained a judgment for the deficiency, and Lyman never has paid a cent since she got the judgment."

It would not serve to promote the suit of plaintiff to set aside the deed of 1898 if the one of 1895 is to be considered a valid instrument, and there is some doubt if the impeaching allegations in plaintiff's complaint can be properly referred to the deed of 1895; but if this be conceded, we are of opinion, on the above stated facts, disclosed in the development of plaintiff's case and relied upon by her to establish it, that her cause of action, if one existed in her favor, is barred by the statute of limitations, whether the ten-year statute, as contained in Revisal, secs. 391 and 399, or the three-year statute, sec. 395, subsec. 9, is to be considered as controlling on the rights of the parties.

It is insisted for plaintiff that the three-year statute, subsec. 9, *supra*, is applicable, which provides that actions for relief on the ground of fraud or mistake are barred in three years, "the cause of action not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake," and this by reason of her

own testimony to the effect that she did not ascertain the existence of these deeds from A. J. Lyman to his wife until some time in 1904, something over two years before the commencement of the present suit.

The authorities seem to hold, as plaintiff contends, that the three years statute is the law properly applicable to the facts presented, *Tuttle v. Tuttle,* 146 N. C., pp. 484-493; *Hooker v. Worthington,* 134 N. C., 283; *Day v. Day,* 84 N. C., 408; but the position of plaintiff concerning it cannot be sustained, for, under authoritative decisions here and elsewhere construing this and similar statutes, it has been very generally held that these words, "the action not to be deemed to have accrued until the discovery of the facts constituting the fraud," etc., by correct interpretation mean until the impeaching facts were known or should have been discovered in the exercise of reasonable business prudence. *Jefferson v. Lumber Co.,* 165 N. C., 49; *Sinclair v. Teal,* 156 N. C., 458; *Peacock v. Barnes,* 142 N. C., 215; *Township v. French,* 40 Iowa, 601; *Shain v. Sresovich,* 104 Cal., 402; Pomeroy's Eq. Juris. (3 Ed.), sec. 917, note 2.

In *Peacock v. Barnes, supra,* speaking to the position and the principle upon which it may be made to rest, the Court said: "A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a position would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case a man's failure to note facts of this character should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud or mistake or some essential facts embraced in the inquiry, we think the correct in- (509) terpretation of the statute should be that the cause of action will be deemed to have accrued from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence."

True, as indicated in *Tuttle v. Tuttle, supra,* and *Stubbs v. Motz,* 113 N. C., 458, the mere registration of a deed will not usually, in these and like cases, be imputed for constructive knowledge; but in the present case the deed under which *feme* defendant claims and now holds this property had been on the registry in the proper county for more than eleven years before this action was instituted, and plaintiff's judgment had been docketed in the county since 1897. She had herself foreclosed a deed of trust on a portion of defendant's property, realizing only a small portion of her debt, and, having recovered judgment for the balance due, she had not been able to collect anything on her claim. There were numerous other encumbrances and liens existent on defendant's

realty, and she states that she had herself visited Asheville some time before to look over his property, etc., and the facts in reference to defendant's embarrassed condition were fully known to her and her agents or were readily ascertainable. Under these conditions, we are constrained to hold that there was negligence on the part of plaintiff in not having sooner examined the records and ascertained the existence of the deeds of *feme* defendant, and that such negligence will be imputed to her for knowledge, and, under the principle of the cases cited, her cause of action accrued much more than three years before action brought.

The suggestion that the statute of limitations does not apply because of a plaintiff being a nonresident is without merit. In this respect the statute, Revisal, sec. 396, refers to the absence of the debtor from the State, and for the reason that he is not for the stated time within the jurisdiction of the court and its process. In its express terms and its purpose the provisions of the section have no application to the creditor's being absent. He can come into the territory of the debtor's residence and sue in its courts whenever he may desire, and there is no reason for such a statute in his favor.

There is no error in the judgment of nonsuit, and the same is

Affirmed.

Cited: Moody v. Wike, 170 N. C. 543 (1g); *Sanderlin v. Cross,* 172 N. C. 242 (2f); *Latham v. Latham,* 184 N. C. 64, 65 (2f, 4f); *Perry v. Surety Co.,* 190 N. C. 292 (1f); *Rhodes v. Tanner,* 197 N. C. 463 (2g, 3b); *Pasquotank County v. Surety Co.,* 201 N. C. 333 (2g, 3b); *Stancill v. Norville,* 203 N. C. 461 (2f, 3g); *Hargett v. Lee,* 206 N. C. 539 (2f); *Wolfe v. Smith,* 215 N. C. 290 (3b); *Johonson v. Ins. Co.,* 219 N. C. 205 (2f); *Currin v. Currin,* 219 N. C. 817 (1g); *Blankenship v. English,* 222 N. C. 92 (2f); *McLain v. Ins. Co.,* 224 N. C. 840 (2f).

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G. HUDSON MAKUEN v. F. H. ELDER.

(Filed 22 December, 1915.)

1. Contracts—Vendor and Purchaser—Agreement of Purchase.

Where the seller of certificates of stock in a corporation agrees with the purchaser that if at the end of a year the latter was not satisfied therewith the former would return a deed he held as security for the purchase price and release the latter from all obligations in the transaction, agreeing to return the purchase price; and it appears that the purchaser was satisfied with his purchase for more than a year, and then

brings his action: *Held*, the plaintiff cannot recover under the intent and meaning of the contract as gathered from its terms.

2. Courts—Law and Equity—Equitable Principles—Contracts—Time as of the Essence.

Our Constitution, Art. IV, sec. 1, providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinctions in the principles applicable to each; and an action to force the provisions of a contract, being one at law, the equity that time is not the essence of the contract has no application.

3. Contracts—Stipulations—Cessation of Liability—Waiver.

Where by the valid terms of a contract the liability of a party thereunder has ceased, he will not thereafter be held to waive it by not asserting it, there being no right existent in him requiring it.

APPEAL by plaintiff *from Webb, J.*, at April Term, 1915, of BUNCOMBE.

This is an action to recover money alleged to be due under a written contract entered into by the plaintiff and the defendant on 16 December, 1908, contemporaneously with the sale of certain stock by the defendant to the plaintiff, the material parts of which are as follows:

"It is hereby agreed between Dr. G. Hudson Makuen and Dr. F. H. Elder that Dr. Makuen is to hold the fully executed deed (with the name in blank) for 217 acres of land in Yancey County, North Carolina, as described in the deed, as security for his investment of $2,000 in the capital stock of The McClellan Mountain Mining and Tunnel Company at 25 cents per share. If at the expiration of one year, or earlier, from date, Dr. Makuen is satisfied that his stock is of the value of his investment, this deed is to be returned to Dr. F. H. Elder, with full release of all obligation to Dr. Makuen in the transaction. If Dr. Makuen is not satisfied that his stock is of the value of his investment, at the expiration of one year from date, Dr. Elder agrees to return to him the $2,000, or, in lieu of the case, will authorize Dr. Makuen to have his name inserted in the blank space for name in the deed and have recorded as his own property. In which event Dr. Makuen agrees to surrender to Dr. Elder the 8,000 shares of the McClellan Mountain Mining and Tunnel Company, and give a quit-claim and full release of all obligation to Dr. Elder."

The plaintiff thereafter bought other stock of the McClellan (511) Mountain Mining and Tunnel Company, his last purchase being in 1910, and he attended and participated in stockholders' meetings of the company in 1910.

The plaintiff made no demand upon the defendant for the payment of money under the contract until the fall of 1910 or the spring of 1911,

and he testified as a witness that he was entirely satisfied with his investment, and did not become dissatisfied until 1910.

In 1911 he sent a note to the defendant which he requested him to sign, which the defendant refused to do, but in the letter declining to sign the note the defendant wrote substantially asking him not to sue and indicating that he felt under some obligation to repay the price of the stock.

The plaintiff does not rely upon this letter as a promise to pay, nor does he declare upon it in his complaint.

At the conclusion of the evidence his Honor entered judgment of nonsuit, upon the ground that as the plaintiff had made no demand upon the defendant at the expiration of the year from the time of entering into the contract, the liability of the defendant then ceased.

The plaintiff excepted and appealed, contending (1) that the time named in the contract was not of the essence of the contract; (2) that if time was of the essence of the contract, that the defendant had waived this stipulation.

Herrick & Bernard for plaintiff.

Harrison, Adams & Adams for defendant.

ALLEN, J. "It is the accepted rule of construction in this and other written contracts that the intent of the parties as embodied in the entire instrument should prevail, and that each and every part shall be given effect if it can be done by fair and reasonable intendment, and that in ascertaining this intent resort should be had, primarily, to the language they have employed; and where this language expresses plainly, clearly, and distinctly the meaning of the parties, it must be given effect by the courts, and other means of interpretation are not permissible." *Gilbert v. Shingle Co.*, 167 N. C., 286.

Applying this rule to the contract, and giving effect to all its parts, the defendant agreed on 16 December, 1908, if he was satisfied with the purchase of the stock at the expiration of one year he would return the deed he held and would release the defendant from all obligations in the transaction, and the defendant agreed to return the purchase price of the stock if the plaintiff was dissatisfied at the expiration of one year.

This is the agreement of the parties and, as there is no allegation of fraud or mistake, we must give effect to it.

(512) The plaintiff testified that he was satisfied with his entire investment, that he bought other stock, some as late as 1910, after he had attended stockholders' meetings and had full opportunity to learn of the condition of the company, and he says: "I was not dissatisfied until

after 1910," more than one year after the making of the contract, and that he made no demand upon the defendant until the fall of 1910 or the spring of 1911.

It is then clear that the plaintiff cannot recover on the contract as it is written, because by its terms the liability of the defendant ceased on 16 December, 1909, as the plaintiff was then satisfied with his investment and did not become dissatisfied until 1910.

If we were to hold otherwise we would be making a contract for the plaintiff and defendant instead of construing and giving effect to the one they have made.

The plaintiff, however, contends that the time fixed in the contract is not material, and invokes the equitable maxim that time is not of the essence of the contract.

This rule usually obtains in courts of equity, but this is an action at law, and while the distinctions between actions at law and suits in equity, and the forms of all such actions, have been abolished (Constitution, Art. IV, sec. 1), "This provision does not imply that the distinctions between law and equity are abolished, or that the principles and doctrines of law and equity are so blended as to constitute one embodiment of legal science, without the differences that have heretofore existed between them and been recognized by courts of judicature in their application. Principles of law, principles and doctrines of equity, remain the same they have ever been. The change wrought is in the method of administering them, and in some degree the extent of the application of them." *Lumber Co. v. Wallace,* 93 N. C., 25.

"At law, time is of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. The rule is applicable where one party agrees to pay money to the other in consideration of the doing of an act by such other within a specified time. In such a case the promise to pay cannot generally be enforced unless the act is performed within the time." 6 Ruling Case Law, 898.

"Parties have the right to make their contracts as stringent as they please, and to make time of the very essence of the contract; and if one party, without the consent of the other, allows the specified time to pass, no matter from what cause, without performing the condition, the stipulated consequences must follow." 9 Cyc., 697.

This principle making time a material stipulation in a contract is peculiarly applicable and important in sales of stock, which fluctuate in value, and if an agreement to purchase should be extended beyond the time fixed by the parties, obligations and terms might be (513) imposed by the courts which the parties would not have assumed when making the contract.

If this is the proper construction of the contract and of its legal effect there can be no waiver, because the liability of the defendant ceased on 16 December, 1909, and thereafter there was no right existent in him which he would have to assert to relieve himself from the obligations of the contract, and consequently there was nothing to waive.

"The term 'waiver' implies the abandonment of some right that can be exercised, or of the renouncement of some benefit or advantage which, but for such waiver, the party relinquishing would have enjoyed. In order to constitute a valid waiver, the right or privilege waived must be in existence. There can be no waiver of a nonexistent, or lost, right." 40 Cyc., 258.

The judgment of nonsuit must be

Affirmed.

Cited: Mfg. Co. v. Lefkowitz, 204 N. C. 453 (3g); *Lithographic Co. v. Mills,* 222 N. C. 519 (3g).

HIGHWAY COMMISSION OF FRANKLIN TOWNSHIP v. GIBSON CONSTRUCTION COMPANY.

(Filed 22 December, 1915.)

Roads and Highways—Bonds—Subsequent Legislation—Restrictive as to Time—Constitutional Law.

An act forbidding the issuance of bonds, theretofore authorized by the Legislature upon the approval of the voters, in a newly created road district, after designated time, in this case twelve months from its enactment, is constitutional and valid, and the bonds thereafter issued are void, and there is no authority in the road commissioners to ratify them.

APPEAL by defendant from *Ferguson, J.,* at November Term, 1915, of MACON.

T. J. Johnston for plaintiff.

Johnston & Horn for defendant.

CLARK, C. J. This is a controversy without action, under Revisal, 803, to determine the validity of $20,000 of 6 per cent road bonds of Franklin Township, Macon County. Chapter 197, Public-Local Laws 1913, created the Highway Commission of Franklin Township, in said county, and authorized it to issue bonds as therein provided, after a favorable election, with the proviso that the total amount of the bonds

outstanding should at no time exceed 10 per cent of the value of the taxable property in the township. The said commission issued and placed on the market $90,000 of the bonds prior to 1 Sep- (514) tember, 1914. The validity of those bonds is not contested.

At the extra session of the General Assembly in 1913 it enacted chapter 6, Public-Local Laws, Extra Session 1913, section 3 of which is as follows: "Unless the bonds provided for by said chapter 197, Public-Local Laws 1913, shall have been issued and placed on the market on or before 1 September, 1914, all rights and powers under said chapter to issue said bonds shall cease and determine." The $20,000 involved in this appeal had neither been issued nor placed on the market on 1 September, 1914. They have not yet been issued, and, indeed, the contract by which the defendant obligated itself to purchase them was not made until 21 October, 1915.

But for chapter 197, Public-Local Laws 1913, the plaintiff, the highway commission, would not be in existence, and it would have had no power or authority to issue the $90,000 worth of bonds sold prior to 1 September, 1914. It was that act which gave existence to the plaintiff and authorized the issue of the bonds. The General Assembly had the same power to withdraw from plaintiff all power thereafter, or after a date named, to issue bonds.

On 1 September, 1914, the plaintiff ceased to have any power or right or authority to issue any bonds. The attempt to issue the $20,000 in bonds after said date was without authority of law. The General Assembly by the act of the extra session might have determined that from and after the passage of the act the authority to issue bonds should be withdrawn. But the General Assembly very considerately gave the plaintiff more than twelve months in which to issue bonds and place them on the market.

The plaintiff relies upon *Highway Commission v. Malone,* 166 N. C., 2, but that decision merely held valid the authority conferred on plaintiff by chapter 197, Public-Local Laws 1913, to issue bonds generally, without any restriction beyond the provision that the amount outstanding should at no time exceed 10 per cent of the value of the taxable property in the township.

McCracken v. R. R., 168 N. C., 62, was a somewhat similar case. There the statute provided that the bonds authorized thereunder should not be valid unless the line of railroad to aid which the bonds were issued should be constructed within three years from the date of the issuance of the bonds, and required the depositary, who was to hold the bonds, in the event of such failure to construct the road within the time specified, to deliver the bonds up for cancellation. This Court held that the railroad company having notice of such provision in the statute,

the bonds should be delivered up for cancellation upon the contingency named, and that the county commissioners were without authority to waive such condition.

(515) In this case the amendatory act gave the plaintiff something over twelve months in which to issue and place the bonds on market, and withdrew from the commission authority to issue any bonds after 1 September, 1914. The commission could not waive such provision in the statute, for the reason that their authority, theretofore given to issue bonds, ceased and determined on 1 September, 1914, and they were without authority to issue or place on the market any bonds after that date.

Reversed.

EFFIE GRIMES v. POLLY ANDREWS, BARTON MARTIN AND WIFE, FLORENCE MARTIN, AND D. S. POWELL.

(Filed 22 December, 1915.)

1. Judgments—Nonsuit—Dismissal—Estoppel.

Where a cause has not been tried upon its merits, but dismissed for failure of a party to restore a lost record required by order of the court, the judgment of the court can have no more legal effect than a judgment of nonsuit, and does not estop the party from maintaining a subsequent suit for the same cause of action.

2. Limitations of Actions—Nonsuit—New Action.

Revisal, sec. 370, requiring that a new action shall be brought within a year after nonsuit or dismissal, applies only when the party would otherwise be barred from his right of action from the lapse of time prescribed by the statute of limitations relating to the cause of action.

3. Limitations of Actions—Possession of Lands.

The statute of limitations will not run in favor of a purchaser of lands at a judicial sale who brings his action to recover the lands from the defendant who has continuously been in possession, and who seeks to engraft a parol trust on the plaintiff's title in his favor.

4. Trusts—Deeds and Conveyances—Parol Trusts—Burden of Proof—Quantum of Proof.

The vendee of a purchaser of lands at a judicial sale by deed purporting to convey the fee brought his action for the possession thereof, and the defendant sought to engraft on the title a parol trust in his favor, contending that the purchaser had bought the land under agreement that he would convey the same to the defendant upon being reimbursed his expenditures: *Held*, the presumption of law is strongly in favor of the correctness of the deed, and it is required that the defendant establish his case by clear, strong, and convincing proof; and a charge of the court that he must do so by the preponderance of the evidence is reversible error.

5. Mortgages—Sales—Adverse Possession—Deeds and Conveyances—Color of Title.

The possession of lands by a mortgagor is not adverse to the mortgagee, and he may not claim under his deed as color of title; and where he continues in possession after foreclosure sale it must be of sufficient character for twenty years to ripen the title in him by adverse possession.

6. Mortgages—Sales—Possession—Equity—Constructive Notice.

Where the mortgagor of lands remains in possession after foreclosure sale, and seeks to engraft a parol trust in his favor on the title of the vendee of the purchaser at the sale, his continued possession is evidence of constructive notice to the vendee of the equity he claims.

7. Mortgages—Foreclosure—Suits—Parties — Mortgagee — Purchaser at Sale.

Where there are several mortgages on land which are foreclosed by suit, and bought by the junior encumbrancer, and all of the mortgagees are parties to the suit, the purchaser acquires a good title, unless he has purchased with notice of an enforceable outstanding equity. As to whether the junior mortgagor would acquire title if he were not a party to the suit, *quere*.

8. Mortgages — Foreclosure — Suits — Equity — Notice — Purchasers for Value—Issues.

The vendee of the purchaser of lands sold by order of court in a suit to foreclose several mortgages thereon brought his action against the mortgagor in possession, who sets up the equity that the purchaser, a junior encumbrancer, had become so under a certain agreement to hold the lands in trust for him. Under the circumstances of this case the Court suggests two issues: (1) "Was the plaintiff a purchaser for value?" (2) "Did she have notice of the equity alleged to have arisen out of the agreement of the mortgagor and the purchaser at the sale?"

APPEAL by plaintiffs and defendants from *Connor, J.*, at March (516) Term, 1915, of PITT.

Civil action to recover the possession of the land described in the complaint.

Defendant denied plaintiff's title and right to the possession, and specially pleaded certain equities to defeat their recovery.

The facts out of which the controversy arose are, briefly stated, these: The land was purchased by Alfred Andrews from W. A. James, and afterwards he mortgaged the same, first, to F. J. H. P. Bryant; second, to D. S. Powell, and, third, to R. J. Grimes. When the debts and mortgages matured F. J. H. P. Bryant brought three suits to foreclose his mortgage, one against Alfred Andrews, another against D. S. Powell, and the third against Alfred Andrews and D. S. Powell, and also prayed for an injunction against the cutting of timber from the land by D. S. Powell under an agreement with Alfred Andrews. The three suits

were consolidated and referred to E. A. Moye, who reported to the court that there was a balance of $198 due by said Andrews to Bryant, the mortgagee, and thereupon the court ordered a foreclosure, and appointed F. G. James commissioner to make the sale. Before these orders were made R. J. Grimes interpleaded and, upon his own request, was made a party to the suits by order of the court. F. G. James reported to September Term, 1900, of the court that he had, on 5 June, 1900, sold the land, as he was ordered to do, and that D. S. Powell had become the last and highest bidder, and the purchaser thereof, at the price of $225. His report was confirmed and, under the order of court, he
(517) conveyed the land to the purchaser, D. S. Powell, by deed dated 18 July, 1901.

The defendant Polly Andrews is the widow of Alfred Andrews, and the *feme* defendant Florence Martin, wife of her codefendant, Burton Martin, is his child and only heir. The remaining defendant, D. S. Powell, was one of the mortgagees and the purchaser of the land at the sale made by the commissioner.

D. S. Powell afterwards conveyed the land, by deed dated 16 August, 1901, to the plaintiff, Effie Grimes, and by it the title to the land was vested in her, at least *prima facie*.

The defendants, in order to rebut this *prima facie* title, alleged, and offered evidence tending to prove, that D. S. Powell had verbally agreed with Alfred Andrews to purchase the land for him at the sale thereof, and convey the same to him on payment of the bid, and also that defendants, other than D. S. Powell and Alfred Andrews, had been in the adverse possession of the land for more than twenty years, and they specially pleaded the same in bar of plaintiff's recovery, and also specially pleaded the ten years statute and seven years of adverse possession under color of title.

Plaintiff replied by denying the adverse possession and averring that there was no parol trust in favor of the defendants pleading the same, and that, if there was, she had purchased for value and without notice of the same.

Upon these contentions made by the pleadings the case came on for trial, whereupon the court submitted issues to the jury corresponding with said contentions, and, in response to them, the jury returned the following verdict:

1. At the time of the sale of the lands in controversy by F. G. James, commissioner, did the relation of mortgagor and mortgagee exist between Alfred Andrews and D. S. Powell with respect to the said land? A. "Yes."

2. At the time of the sale of the lands in controversy by F. G. James, commissioner, did the relation of mortgagor and mortgagee exist between

Alfred Andrews and R. J. Grimes with respect to the said land? A. "Yes."

3. Was the land in controversy conveyed by D. S. Powell to plaintiff, Effie Grimes, at the request and for the benefit of her father, R. J. Grimes? A. "No."

4. What sum, if any, did Effie Grimes pay for said land? A. "Nothing."

5. At the time Effie Grimes took the deed for the said land did the relation of mortgagor and mortgagee exist between Alfred Andrews and R. J. Grimes with respect to said land? A. "Yes."

6. Did Effie Grimes or R. J. Grimes have notice, when the deed (518) was made to her by D. S. Powell, of the relation of mortgagor and mortgagee between Alfred Andrews and D. S. Powell with respect to said land at the time Powell bought at the sale made by F. G. James, commissioner? A. "Yes."

7. Did D. S. Powell bid off the land at the sale made by F. G. James, commissioner, pursuant to a parol agreement between himself and Alfred Andrews that he would buy the land for Andrews? A. "Yes."

8. If so, did Effie Grimes have notice of such agreement when D. S. Powell conveyed the land to her? A. "No."

9. Has the defendant Florence Martin, and those under whom she claims, been in possession of the tract of land in controversy, holding the same adversely against all parties, for more than twenty years next prior to the commencement of this action, as alleged? A. "Yes."

10. Has the defendant Florence Martin, and those under whom she claims, been in possession of the tract of land in controversy, holding the same adversely to all parties, for more than ten years prior to the commencement of this action, as alleged? A. "Yes."

11. Has the defendant Florence Martin, and those under whom she claims, been in possession of the tract of land described in the pleadings, holding adversely to all parties under color of title, for more than seven years next prior to the commencement of this action, as alleged? A. "Yes."

12. When was the action entitled "Alfred Andrews, Polly Andrews, and Florence Martin v. D. S. Powell and Effie Grimes" dismissed? A. "November Term, 1910."

13. Did more than twelve months elapse after the dismissal of the action of Alfred Andrews, Polly Andrews, and Florence Martin v. D. S. Powell and Effie Grimes prior to the commencement of this action, as alleged? A. "Yes."

14. Is the plaintiff the owner of and entitled to the possession of the land described in the complaint? A. "No."

15. Are the defendants Burton Martin and wife, Florence Martin, in the wrongful and unlawful possession of the same? A. "No."

16. What is the annual rental value of said land? A. "$20."

At the close of the evidence the plaintiff and D. S. Powell asked for judgment, on the pleadings, admissions, and all the evidence, for the land in controversy and the amount of the annual rent of $20 from January, 1909, and for an instruction to the jury that the fourteenth and fifteenth issues be answered "Yes"; which requests were refused by the court, and plaintiffs excepted.

The Court instructed the jury to answer the second issue "Yes" and the fourth issue "Nothing," and plaintiff and D. S. Powell again excepted.

(519) Plaintiff Effie Grimes moved that the court set aside the findings under the ninth, tenth, eleventh, and fourteenth, and fifteenth issues, which motion was at first refused, and afterwards granted as to the ninth, eleventh, fourteenth, and fifteenth issues, leaving the others intact. Defendants, other than D. S. Powell, excepted. The plaintiff and D. S. Powell had duly objected to the submission of the first thirteen issues, and they excepted to the overruling of their motion. They also excepted to the following instruction of the court upon the ninth issue, as to whether there was a parol agreement between D. S. Powell and Alfred Andrews that the former should buy the land, at the sale, for the latter: "The burden of this issue is upon the defendant Florence Martin, that is, she must produce evidence that will satisfy you by its greater weight of the truth of that. By the greater weight of the evidence, the overbearing evidence, that, prior to the sale, Powell had a conversation with Andrews; that he agreed to come to Greenville and buy this land off for him and to pay for it out of the money that he owed Andrews for the timber that he had cut off of the land." They also excepted to the refusal of their motion for judgment upon the remaining issues, after the others had been set aside, and for $20 as the annual rental value of the land.

The plaintiff's thirtieth assignment of error is as follows: "The court refused to set aside the whole verdict and refused to sign judgment for the plaintiff, but ordered the issues of the verdict which had not been set aside recorded, to which order the plaintiffs Effie Grimes and D. S. Powell excepted." There were other exceptions taken by plaintiff and D. S. Powell to evidence and other matters, but, in the view the court takes of the case, it is not necessary to state them here.

Defendants, other than D. S. Powell, moved to nonsuit the plaintiff. The motion was denied, and they excepted. There are other exceptions of the defendants, but they need not be mentioned here, except the one

taken to the refusal of the court to render judgment in their favor upon the remaining issues.

Plaintiff and D. S. Powell and the defendant Florence Martin appealed.

Julius Brown for plaintiff.
Harry Skinner, Albion Dunn, and L. G. Cooper for defendant.

PLAINTIFF'S APPEAL

WALKER, J., after stating the case: The ruling of the court which denied plaintiff's motion for judgment was correct. The dismissal of the former suit, if for the same cause of action, did not constitute an estoppel, as the case was not heard and decided on its merits, but the dismissal was equivalent to a nonsuit, granted because plaintiff in that suit had not prosecuted the same. It was early decided, in (520) *Bond v. McNider*, 25 N. C., 440, that no judgment, but one on a *retraxit* or on the merits, will bar a subsequent action, and that an entry, "Dismissed at the costs of the defendant," is not to be considered as a *retraxit*, or a judgment upon the merits, so as to constitute a bar to another action for the same cause. It is simply a judgment of discontinuance, where the court erred in ordering the defendant to pay the costs, where such order was made by the consent of the parties. It was also held that the entry that the defendant pay the costs was not even *prima facie* evidence of an accord and satisfaction. It was said, more at large, in that case that, "At common law there is no form of an entry in the books of a judgment dismissing an action. Every judgment against a plaintiff is either upon a *retraxit, non pros.*, nonsuit, *nolle prosequi*, discontinuance, or a judgment on an issue found by the jury in favor of the defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgments are variant, but the conclusion in each is always the same; it is as follows: 'Therefore, it is considered by the court that the plaintiff take nothing by this writ, and that the defendant go without day and recover of the plaintiff his costs, etc.' If the entry above mentioned could be considered as a *retraxit*, or a final judgment on the merits, it would bar the plaintiff's action; otherwise it would not. A *retraxit* it cannot be, for that is always made in person in open court, when the trial is called. 2 Arch. Prac., 250; 3 Thomas Coke, 500. The issue upon the plea of "release" in the county court was not tried by a jury; so that the said entry could not be considered a judgment upon a verdict. The entry does not show that the merits of the cause were passed upon. We know of no reported case like it in this State. We must, however, consider it as nothing more than a judgment of discontinuance, where the court erred in order-

ing the defendant to pay the cost, or it is such a judgment with the consent of the parties that the defendant should pay the costs. *Carter v. Wilson,* 2 Dev. and Bat., 276. It is therefore no bar to this action. Arch. Prac., 235; Maule and Selw., 153."

The case of *Bond v. McNider* has been frequently approved by this Court: *Plummer v. Wheeler,* 44 N. C., 472; *Carr v. Woodleff,* 51 N. C., 400; *Idding v. Hiatt, ibid.,* 402; *Koonce v. Pelletier,* 82 N. C., 237, 240; *Rollins v. Henry,* 84 N. C., 570, 579; *Weeks v. McPhail,* 129 N. C., 73.

In *Koonce v. Pelletier, supra, Smith, C. J.,* said that "The dismissal, on account of its vague and unsatisfactory statements and not being based upon an examination into the merits, is rather of the nature and effect of a nonsuit, as was held in *Bond v. McNider,* 25 N. C., 440, and is not a bar to a subsequent application." It was also held in *Campbell v. Potts,* 119 N. C., 530, that "Where, in an action to recover land, the defendant pleaded in bar a former judgment in an action brought
(521) against her by plaintiff's grantor, in which defendant had denied the grantor's title, and it appeared that there had been no trial of such former action, but only a judgment of dismissal, such judgment of dismissal was not a bar to the existing action." Black on Judgments states this principle with clearness and accuracy. There it is said: "The mere dismissal of a complaint in an action at law, even after the plaintiff has put in his evidence on the trial, has no more force than a nonsuit at common law, and does not bar a subsequent action for the same cause. As there may be various sorts of nonsuits, considered with reference to the stage of the cause at which entered, and in respect to the question of the plaintiff's acquiescence, so will it be with judgments of dismissal. And in the first place it is perfectly evident that a judgment entered upon the dismissal of a complaint because of the plaintiff's failure to appear, where there was no trial of the action and no consideration of its merits, cannot be a bar to a subsequent suit. And when it appears from the record that the court never determined the merits of the controversy nor rendered any judgment affecting the same, but simply dismissed the plaintiff's action, without trial and without evidence, such judgment does not support a plea of former adjudication." Numerous cases which are collected in the note fully sustain this text. And to the same effect is Freeman on Judgments (4 Ed.), sec. 261, where we find this statement: "Judgments of nonsuit, of *non prosequitur,* of *nolle prosequi,* of dismissal, and of discontinuance are exceptions to the general rule that when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried. A nonsuit 'is but like the blowing out of a candle, which a man at his own pleasure may light again.' Under no circumstances

will such a judgment be deemed final, whether entered before or at the trial." And again, at p. 476: "A dismissal or nonsuit not determining the rights of the parties cannot support the plea of *res adjudicata*. Nor will the reasoning and opinion of the court upon the subject, on the evidence adduced before it, have the force and effect of a thing adjudged, unless the subject-matter be definitely disposed of by the judgment."

We do not say that where it appears that the merits have been considered and passed upon, the judgment of dismissal may not be successfully pleaded as a former adjudication, but no such thing occurred here. The other suit was dismissed, with costs against the plaintiff, simply because he had failed to restore the lost record, and in no sense were the merits touched upon. It could have no more legal effect than a nonsuit, where the plaintiff fails to prosecute his cause, or is called and fails to appear. His laches put him out of court, and that is all it does, and he may come back again at his will and pleasure and pursue the same cause without being affected by any bar of the former (522) judgment.

Nor do we think that the plaintiff can gain anything by reason of the fact that the suit was not revived within one year after the dismissal. That is required to be done only under Revisal, sec. 370, where the statute of limitations would otherwise bar by the lapse of the period prescribed for bringing the suit.

It was held in *Keener v. Goodson*, 89 N. C., 273, that section 370 was intended to enlarge the period of limitation and not to abridge it. But the conclusive answer to this contention is that the defendant was in possession of the land all the time from the day of the sale, and the statute did not run against her for that reason, so that the failure to bring her action within the supposed year of grace is not material. That her possession, and that of her father, suspended the operation of the statute has been well settled. *Mast v. Tiller*, 89 N. C., 423. The provision as to bringing a new action within one year after a nonsuit or dismissal, reversal, or other termination of the first suit, as prescribed in the statute, refers only to those cases where the statute of limitations is applicable, and would bar, but for this clause, which, if complied with, saves the cause of action. Clark's Code (3 Ed.), sec. 142 and note. If the possession of the *feme* defendant, since the sale, prevents the bar of the statute, she did not need the additional time of one year within which to sue. The one-year clause applies only where the statute is operative and would defeat the new action if it were not commenced with the extended period, as above shown.

But, while the plaintiff was not entitled to judgment upon the record, we are of the opinion that the judge committed an error in the instruc-

tion as to the quantum of proof, in the seventh issue. It was intended by the issue to engraft a parol trust upon the legal title acquired by D. S. Powell, at the sale, which afterwards passed, by his deed, to Effie Grimes, the plaintiff. The deed, on its face, purports to convey to her a fee simple absolute in the land, and defendants seek to change this into an estate in trust, the terms of the latter being that Alfred Andrews should be entitled by virtue of a prior agreement with D. S. Powell to have him, Powell, reconvey the land to him upon reimbursing Powell his expenditures. This essentially changes the deed, and, as the law strongly presumes that it was correctly written, it requires more than a bare preponderance of the evidence, or the overbearing of the evidence, to meet this strong presumption and overcome it. This case is not unlike the many we have decided which involve the same question, as to the quantum of proof, where the deed is substantially varied from the "written words," which we have so often said must abide and control the rights of the parties unless the requisite evidence is forthcoming. We have, at this term, fully discussed the matter in several cases, re-
(523) affirming what was decided in *Ely v. Early,* 94 N. C., 1; *Harding v. Long,* 103 N. C., 1; *Cobb v. Edwards,* 117 N. C., 253; *Avery v. Stewart,* 136 N. C., 426; *Lehew v. Hewett,* 138 N. C., 6; *King v. Hobbs,* 139 N. C., 171; *White v. Carroll,* 147 N. C., 330; *Gray v. Jenkins,* 151 N. C., 80; *McWhirter v. McWhirter,* 155 N. C., 145. The cases at this term in which we applied the same rule of evidence are *Ray v. Patterson, ante,* 226; *Lamb v. Perry,* 169 N. C., 436, and *Glenn v. Glenn,* 169 N .C., 729, to all of which we refer without further comment, except *Glenn v. Glenn, supra,* 169 N. C., at p. 730, where it is said to be established with us that "where a defendant holds under a deed formally conveying to him the legal title to real property, and a claimant is seeking to correct a mistake in the instrument or annex a condition to it or engraft a trust upon it, he is required to make out his claim by clear, strong, and convincing proof. *Cedar Works v. Lumber Co.,* 168 N. C., 391; *Ely v. Early,* 94 N. C., 1." *Cobb v. Edwards* and *Ray v. Patterson, supra,* are exactly like this case, and certainly so in principle. This error entitles the plaintiff to a new trial, which is ordered.

New trial.

DEFENDANTS' APPEAL.

WALKER, J. The court was right in refusing to enter judgment of nonsuit against the plaintiff. The defendants were not entitled to judgment upon the verdict, so far as it related to the parol trust, as the instruction of the court upon the seventh issue was erroneous, as we have held in the plaintiff's appeal; and a new trial was the necessary result. The motion for a nonsuit was made by defendants, we presume, in order to preserve their rights, if we had decided that there was no error as to

that issue. Nor were defendants entitled to judgment upon the verdict, so far as it related to the ninth and eleventh issues, and the fourteenth and fifteenth issues, as the court set them aside, and very properly. The possession of Alfred Andrews was not adverse prior to the sale by the commissioner, F. G. James, in 1901, as a man cannot hold possession adversely to himself. Alfred Andrews owned the land on 21 February, 1900, when he mortgaged it to D. S. Powell, and his possession from that time to the day of the sale by the commissioner was subordinate to the title of his mortgagee. *Parker v. Banks,* 79 N. C., 480, where it was said by *Justice Bynum:* "It is well settled that the mortgagor is the tenant of the mortgagee, and, therefore, that his possession is not hostile, or adverse, to the mortgagee." So that, nothing else appearing, except the simple relation of mortgagor and mortgagee, with the former in possession of the land, there was no adverse holding by him, and such a possession could not commence until after the sale, when the title had passed from him, or his heir if he had died intestate, to the purchaser. He must have twenty years adverse possession after that time before the title will be restored to him, and he (524) cannot rely on his former title as color, for he lost that by the sale. He must have acquired a new color after the sale. We discussed this phase of the case fully in *Call v. Dancy,* 144 N. C., 495, following the decisions in *Johnson v. Farlow,* 35 N. C., 84, and *Wilson v. Brown,* 134 N. C., 400.

There being no adverse possession by the defendants under color, and none without color sufficient in length of time to vest a new title in defendants, the judge was clearly right in setting aside the ninth and eleventh issues; and as there was nothing left for the fourteenth and fifteenth issues to rest upon, it follows logically that they also should have been set aside.

The last three issues were dependent upon the findings of the jury in response to those preceding them, and were submitted merely to determine the title, as between the parties, according to the verdict on the other issues.

The judge left the tenth issue undisturbed, we presume, for the purpose of ascertaining whether the defendants had been in possession, claiming the land as their own, as bearing on the question of notice to plaintiff of defendant's equity, growing out of the alleged parol trust, the general rule being that possession constitutes such notice. *Justice Dillard* said, in *Heyer v. Beatty,* 83 N. C., 289: "The rule in equity undoubtedly is that a party taking with notice of an equity takes subject to that equity; that is to say, he is assumed to take and hold only such interest in the property conveyed as his vendor might honestly dispose of, having due regard to the equities existing against him in favor of others. Adams Eq.,

151; *Webber v. Taylor,* 55 N. C., 9; *Maxwell v. Wallace,* 45 N. C., 251. And the kind of notice spoken of in said rule may be an actual or constructive notice. In this case there is no pretense of actual notice to the plaintiff of the right claimed by defendant, but it is plainly implied, from the terms in which the instruction was asked, that the defendant claimed only to affect the legal title of the plaintiff with a trust from a notice by construction from the mere fact of his possession at the time of the sale. Possession is suggestive of title or right in the possessor, and a prudent man should and would inquire into such apparent right before trading with another; and if he do not, it is but just to the rights of the party in possession to hold the purchaser as affected with notice of the equities in his favor." Many cases have approved this doctrine. *Edwards v. Thompson,* 71 N. C., 177; *Tankard v. Tankard,* 79 N. C., 55 (*s. c.,* 84 N. C., 288); *Bost v. Setzer,* 87 N. C., 187; *Johnson v. Hauser,* 88 N. C., 388; *Staton v. Davenport,* 95 N. C., 12; *Campbell v. Farley,* 158 N. C., 42. This rule, if it appears, by the facts developed at the next trial, to be applicable, will be available to the party who may benefit by it.

(525) As to Effie Grimes being a purchaser for value, we presume the evidence on that question will be made clearer hereafter. There was some dispute between counsel as to the effect of an entry in the record apparently bearing upon that issue, and a petition for a *certiorari* was filed for the purpose of having it appear more certainly what the entry meant and how it should be used in the case; but we did not consider it necessary that notice of the petition should be issued, as the matter may be differently presented if the case again comes before us.

We would suggest that the fourth issue be worded so as to submit the inquiry to the jury in this form: "Was Effie Grimes a purchaser for value?" and the eighth issue in this form: "Did she have notice of the equity alleged to have arisen out of the agreement between Alfred Andrews and D. S. Powell?" The issues as to the parol trust, as to Effie Grimes being a purchaser for value and as to her having notice of the equity, should be submitted together and consecutively, as they will now constitute defendant's main if not sole ground for a recovery. We suggest the change in the form of the issue as to plaintiff being a purchaser for value, because in its present form an answer as to what she paid for the land would not necessarily determine whether or no she bought for value, as, in the legal sense of that term, she may have paid more or less than its value for the land.

The court committed no error in refusing to sign the judgment tendered by the defendant, as, in the view we have taken of the case, they were not entitled to it. We may add, though, that if D. S. Powell and R. J. Grimes, the junior encumbrancers, were parties, with F. J. H. P.

Bryant, the senior mortgagee, and Alfred Andrews, the mortgagor, to the foreclosure suit, we do not see why D. S. Powell did not acquire a good title, unless Powell made the agreement with Andrews as alleged by defendants and the plaintiff did not purchase from him for value and without notice of it, because, with the consent of the court, D. S. Powell, the junior encumbrancer, could buy, being a party to the suit, and the court sold the legal title and all the equities. Whether D. S. Powell could have bought if he had not been a party to the foreclosure suit, but simply the holder of a junior mortgage, we need not decide. We held in *Jones v. Williams,* 155 N. C., 179, that the holder of a junior mortgage could not be deprived of his rights by a sale under a decree in a foreclosure suit to which he was not a party, and it would seem, without finally deciding the question, as all the facts are not now certainly and definitely before us, that a sale under a foreclosure decree would pass a good title against all who were made parties to the suit; and if this be so, *Taylor v. Heggie,* 83 N. C., 244, relied on by the defendants, would have no application. We prefer, though, not to give any final or conclusive opinion upon this question until we are better informed as to the facts. It appears, but only by inference from what is stated in the record, that all persons, mortgagor and mortgagee, interested in a foreclosure, were made parties to the suit in which the sale (526) was decreed.

The general result in both appeals is that a new trial must be had, and the issues rearranged so as to eliminate those which have been rendered useless or immaterial by this opinion, and some changed so as to present the true inquiries more clearly and sharply to the jury and in a more compact form.

There was error in plaintiff's but none in this appeal.

No error.

It will, therefore, be certified accordingly to the Superior Court.

In plaintiff's appeal, New trial.

In defendant's appeal, No error.

Cited: Geitner v. Jones, 176 N. C. 544 (2f); *Shell v. Lineberger,* 183 N. C. 443 (2f); *Richardson v. Satterwhite,* 197 N. C. 612 (1f); *Hampton v. Spinning Co.,* 198 N. C. 239 (1b); *Loan Co. v. Warren,* 204 N. C. 51 (1d); *Ins. Co. v. Dial,* 209 N. C. 351 (6g); *Steele v. Beaty,* 215 N. C. 682, 683 (1d); *McCorkle v. Beatty,* 226 N. C. 342 (4f).

W. T. COGDILL AND WIFE v. W. T. CLAYTON AND CHAMPION FIBER COMPANY.

(Filed 22 December, 1915.)

Removal of Causes—Diversity of Citizenship—Fraudulent Joinder of Parties—Jurisdictional Amount—Denial of Allegations.

Where the petition to remove a cause from the State to the Federal court for diversity of citizenship and the fraudulent joinder of a resident defendant is sufficiently specific in its allegation as to the fraudulent joinder, but the complaint alleges that the cause of action accrued since the enactment of the Federal statute raising the amount to a sum exceeding $3,000, etc., necessary to confer jurisdiction on the Federal court, and lays the damages at $3,000, and no facts are stated in the petition to sustain the charge that the allegation in the complaint as to the time the cause of action accrued is fraudulent, the petition for removal will be denied. The relative duties and jurisdictions of the State and Federal courts upon such motions pointed out by ALLEN, J.

APPEAL by plaintiffs from *Cline, J.*, at February Term, 1915, of JACKSON.

This is an appeal from an order removing the action from the State to the Federal court upon the ground of diverse citizenship.

The action was brought by the plaintiffs against the defendant W. T. Clayton, a citizen and resident of Jackson County, and the defendant Champion Fiber Company, a corporation duly organized under the laws of the State of Ohio, returnable to February Term, 1915, of the Superior Court of Jackson County.

The plaintiffs filed their complaint within the first three days of court, alleging that they were the owners of a certain tract of land of 645 acres in said county and the acid and pulp woods thereon, and that
(527) the defendants made and entered into a contract on 7 March, 1907, with the plaintiffs under the terms of which the defendants undertook that they would, within five years and within the life of a certain flume which had been constructed by the plaintiffs and was in said agreement sold to the defendants, cut and remove all the said acid and pulp woods from the said lands, paying the plaintiffs the sum of $1 per cord therefor, in the manner and under the terms and conditions as alleged, and which said contract was to be completed and all of said acid and pulp woods removed and paid for on or by 7 March, 1912; that plaintiffs' cause of action accrued on 7 March, 1912; that the defendants had until 7 March, 1912, to complete their said contract and make settlement therefor, but that the defendants failed and neglected to remove the said woods from the said lands and to make settlements therefor, and left large quantities of said woods standing and being thereon; and

in the meantime the flume line, by which alone the same was made marketable, became unfit for use, and that the plaintiffs, by reason of the breach of said contract, were damaged in the sum of $3,000.

During said February term of court, and in apt time, the defendant Champion Fiber Company filed its duly verified petition and bond for removal of the action to the Federal Court for the Western District of North Carolina, setting forth two grounds for removal: (1) that the matter in controversy exceeded, exclusive of interest and costs, the sum of $2,000, and that plaintiffs' cause of action arose prior to 1 January, 1912; (2) that the defendant W. T. Clayton was not a necessary party defendant, and was joined as such with the fraudulent purpose of depriving the Federal court of its rightful jurisdiction.

No fraud is alleged as to the first cause of removal, the defendant simply denying that the cause of action arose prior to January, 1912. The court signed an order removing the cause to the Federal court, and the plaintiffs excepted and appealed to the Supreme Court.

Coleman C. Cowan for plaintiffs.
Martin, Rollins & Wright for defendants.

ALLEN, J. The questions of the right to the removal of actions from the State to the Federal courts, and of the procedure on motions made for this purpose, have been very fully considered in several recent decisions of this Court, and the rules deducible from these authorities and from the decisions of the Supreme Court of the United States are:

1. That the petition for removal must state the facts upon which the motion is based, and not mere conclusions.

2. That the petition is insufficient if it does no more than deny the cause of action alleged in the complaint.

3. That the State court has jurisdiction for the purpose of determining if the facts alleged present a removable cause.

4. That the State courts cannot inquire into and decide as to the (528) truthfulness of the facts alleged in the petition.

5. That if the facts alleged in the petition are sufficient to justify a removal, it is the duty of the courts of the State to make the order for the removal, and that it is for the Federal court to inquire into and determine the truth of the facts alleged upon a motion by the plaintiff in the Federal court to remand to the State court. *Herrick v. R. R.*, 158 N. C., 307; *Rea v. Mirror Co.*, 158 N. C., 28; *Hyder v. R. R.*, 167 N. C., 588; *R. R. v. Cockrill*, 232 U. S., 146.

In *R. R. v. Cockrill, supra,* an action was commenced in the State courts of Kentucky against the railroad, a Virginia corporation, and against the engineer and fireman, who were citizens of Kentucky, to

recover damages for wrongful death. The defendant railroad company filed its petition for removal upon the ground of diverse citizenship, alleging a fraudulent joinder of the engineer and fireman; but this allegation consisted only in charging fraud in general terms and in a denial of negligence. The State courts denied the action to remove, and proceeded with the trial, and from the final judgment in the Supreme Court of Kentucky the defendant sued out a writ of error to the Supreme Court of the United States. The judgment of the State courts was affirmed, and the Court said of the rule governing removals:

"The right of removal from a State to a Federal court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of this right, therefore, it is essential that the case be shown to be within one of those classes, and this must be done by a verified petition, setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable, or belongs to one of the enumerated classes, or otherwise to rest a right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing, in order that the court may draw the proper conclusion from all the facts, and that, in the event of the removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. . . . A civil case, at law or in equity, presenting a controversy between citizens of different States, and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. . . . Merely to traverse the allegations upon which the liability of a resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice. The showing must be such as compels the conclusion that the joinder is without right and made in bad faith. . . . It is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal court, and that the State court, for the
(529) purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition."

Applying these principles, and considering the petition in connection with the complaint, we would have no hesitation in affirming the order of removal if the petition rested alone on the fraudulent joinder of the defendants, as the facts constituting the fraud are specifically alleged; but if the other defendants were stricken from the record we would have a cause of action for $3,000 stated against the defendant corporation arising in 1912, after the enactment of the Judiciary Act of 1911 in-

creasing the jurisdictional amount to $3,000, and no facts are stated in the petition tending to sustain the charge that the allegation in the complaint as to the time when the cause of action accrued is fraudulent; and upon this ground the order is

Reversed.

Cited: Fore v. Tanning Co., 175 N. C. 584 (g); *Public Service Co. v. Power Co.*, 180 N. C. 359 (g); *Stevens v. Lumber Co.*, 186 N. C. 751 (g); *Johnson v. Lumber Co.*, 189 N. C. 83, 84 (g); *Crisp v. Fibre Co.*, 193 N. C. 84 (g); *Clevenger v. Grover*, 211 N. C. 243 (g); *Edwards v. R. R.*, 212 N. C. 65 (g); *Kerley v. Oil Co.*, 224 N. C. 467 (g).

C. P. HOGSED ET AL. v. GLOUCESTER LUMBER COMPANY.

(Filed 22 December, 1915.)

1. Appeal and Error—Former Appeal—Second Appeal—Different Parties.

Where the Supreme Court has decided the matters presented on appeal by some of the parties interested in the controversy, other parties thereto may not prosecute a second appeal from the application by the referee of the principles formerly passed upon, for the former decision is the law of the case and cannot be reviewed on a second appeal.

2. Liens—Statutes—Cutting Logs—Appeal and Error—Costs.

The definition of laborers who are entitled to a lien for work while engaged in cutting logs into lumber, under the provisions of chapter 150, sec. 6, Laws 1913, as decided in *Glazener's case*, 167 N. C., 676, is further classified in this case; and the laborers being entitled to a lien upon their employers' interest in the lumber, it is held that the amounts due them be retained out of such interest and paid over to them. The plaintiffs, having established their lien, are entitled to recover cost of appeal. Revisal, 1279.

WALKER and HOKE, JJ., dissent.

APPEAL by defendant from *Long, J.*, at Spring Term, 1915, of TRANSYLVANIA.

O. W. Clayton and N. Y. Gulley for plaintiffs.

Welch Galloway and Alf. Barnard for defendant.

CLARK, C. J. This case was before this Court under the title *Glazener v. Lumber Co.*, 167 N. C., 676. It now comes up on appeal from the judgment applying that decision to the facts found by the referee. The

(530) former decision is the law of the case, and cannot be reviewed on a second appeal.

Laws 1913, ch. 150, sec. 6, provides: "Every person doing the work of cutting or sawing logs into lumber . . . shall have a lien upon said lumber for the amount of wages due them, and the said lien shall have priority over all other claims or liens upon said lumber, except against the purchaser for full value and without notice thereof." We are of opinion, upon the list of claimants found by the referee and their vocations, that the following can be deemed to have been engaged in "the work of cutting or sawing logs into lumber," *i.e.*, Glazener, Mill hand, piling lumber; Boyd, mill hand, inspecting lumber from saw; Whit Myer, mill hand, handling lumber; and all others who were found to have been mill hands handling the lumber, including the sawyer, the lumber stacker, the mill foreman, the slabman, the saw filer, the engineer for the mill engine, the fireman at the mill boiler, the lumber handler, the edgerman, the jacker and piler.

But we do not think that under the description "doing the work of cutting or sawing logs into lumber" will fall those described as engaged on the train hauling logs, such as the engineer on the log train, the trimmerman, the dogger on carriage (unless this means on the saw carriage, in which case he would be engaged in cutting), fireman on the log train, conductor and brakeman on the same, and others engaged in bringing logs to the mill to be thereafter sawed into plank by those engaged in that service. The men engaged in working on the log train in any capacity, the night watchman, and all connected with the repairs to the machinery, or running the log train or bringing in the logs, cannot be said to come within the description, "engaged in the work of cutting or sawing logs into lumber," as defined by us in *Glazener v. Lumber Co.*, 167 N. C., 676.

In said former case we held that the plaintiffs were entitled to a lien upon whatever interest in the lumber their employer, Campbell, should be found to have upon the settlement of the suit pending between Campbell and the lumber company. Whenever that amount is ascertained the liens of the laborers are the first thereon, and by virtue of the judgment in this case said amount must be retained by the lumber company and paid over to these plaintiffs so entitled. The lumber company will receive credit for such amount in settlement with Campbell, if they owe him so much.

The cost of this appeal will be taxed in favor of the plaintiffs, since they have recovered judgment for a part of their demand, and the lien has been determined in their favor. Revisal, 1279.

The judgment below, in accordance with this opinion, will be

Modified.

WALKER, J., and HOKE, J., dissent.

Cited: Bryson v. Lumber Co., 171 N. C. 702 (2f); *Graves v. Dockery*, 200 N. C. 318 (2f).

(531)

T. M. CUTHBERTSON ET AL. v. THE PEOPLES BANK OF ELIZABETHTOWN, TENN.

(Filed 22 December, 1915.)

1. Usury—Bills and Notes—Judgments—Credits—Principal and Surety.

Where a borrower of money from a bank has paid an usurious rate of interest, and has the bank to accept in settlement of the indebtedness then existing another note of his with indorsers, against the latter of whom the bank obtained judgment, it is held that the maker is entitled, in an action against the bank, to recover twice the amount of the usurious interest paid (Revisal, sec. 1951), to be applied to the discharge, *pro tanto*, of the note, and the judgment against the indorser.

2. Usury—Equity—Forfeitures—Actions at Law.

The principle that a court of equity will eliminate an usurious rate of interest from the debt when the suit is brought by the debtor for the penalty, upon his paying the principal sum and the legal rate of interest, does not apply to an action at law involving no equitable principle.

3. Usury—Nonresident Creditor—Statute of Limitations.

An action against a nonresident creditor for the statutory penalty for charging usury (Revisal, sec. 1951), who has no agent here upon whom process may be served, is not barred by the statute of limitations, nor does the fact in this case that one of the plaintiffs is a nonresident and the other has changed his residence affect the matter.

APPEAL by defendant from *Harding, J.*, at Spring Term, 1915, of AVERY.

Civil action heard upon exceptions to referee's report. From the judgment rendered defendant appealed.

W. C. Newland, S. J. Ervin for plaintiff.

J. D. Love for defendant.

BROWN, J. It appears from the clear and intelligent report of the referee that Ashley & Lusk were borrowers of money from defendant and paid it much usurious interest. In 1909 defendant accepted in settlement of indebtedness then existing three notes of Ashley & Lusk of $1,000 each, with the other plaintiffs herein as indorsers. The de-

fendant obtained judgments against the three indorsers on the notes, which are unpaid. In the present action the three plaintiff indorsers ask that the judgments be set aside for fraud.

The referee ruled against them and sustained motion to nonsuit. As they have not appealed, that feature of the case is eliminated. Plaintiffs Ashley & Lusk seek to recover the penalty for usurious interest paid defendant by them, and ask that it be applied in satisfaction of the judgments against their indorsers, and that the debt as to them be discharged *pro tanto,* also, as it is the same indebtedness upon which the said judgments were recovered.

(532) The defendant in its answer admits receipt of as much as 10 per cent interest in advance on its loans to Ashley & Lusk, and avers that the three $1,000 notes, on which judgments were obtained against the indorsers, represent only principal money. The statute of limitations is pleaded and judgment demanded against Ashley & Lusk, as well as the indorsers on the said notes.

The judge confirmed the report of the referee. The findings of fact are binding upon us, as it is not contended that there is no evidence to support them. The referee finds that defendant knowingly and intentionally exacted 10 and 12 per cent interest on the various loans to said plaintiffs and that the aggregate amount of interest received was $1,971.80, and that in June, 1909, the amount due by plaintiffs Ashley & Lusk to the defendant upon the several notes mentioned (not taking into consideration usurious interest charged), and allowing credit for the partial payments, was $3,034.

Our statute provides that where usury is exacted the person who has paid it may recover back twice the amount of interest paid, and further, "That in any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt it shall be lawful for the party against whom the action is brought to plead as a counterclaim the benefit above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest." Revisal, 1951.

There can be no question that upon these findings the defendant is liable for the penalty, and that it must be applied to the discharge *pro tanto* of the notes of Ashley & Lusk as well as to the judgments against the indorsers, as directed by the referee.

The defendant invokes the well established principle of equity that a debtor, seeking the aid of a court of equity, will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate. *Churchill v. Turnage,* 122 N. C., 426; *Owens v. Wright,* 161 N. C., 127; *Simonton v. Lanier,* 71 N. C., 498.

There is nothing in this case upon which to apply that principle. In the cases cited it will be found that the plaintiffs were seeking aid of a court of equity to enjoin the foreclosure of a mortgage or to grant other equitable relief. These plaintiffs do not seek the interposition of equity in their behalf. They are suing at law "in an action in the nature of an action for defendant," as provided in the statute for a statutory penalty.

The statute of limitations does not bar this action as the defendant is a nonresident corporation with no agent in this State upon whom process could have been served. *Williams v. B. and L. Assn.*, 131 (533) N. C., 267.

The fact that the plaintiff Ashley is a nonresident of the State and that plaintiff Lusk has been a nonresident for nearly two years since their cause of action accrued did not start the running of the statute in favor of a nonresident corporation which had not appointed an agent for service in the State of the forum. 25 Cyc., 1238-1240.

The judgment is

Affirmed.

Cited: Whisnant v. Price, 175 N. C. 614 (j).

J. MAVIN YATES v. LOUISA YATES.

(Filed 22 December, 1915.)

1. Costs—Equity—Court's Discretion—Statutes.

Under Revisal, secs. 1264 and 1266, allowing costs to the successful litigants, construed with section 1267, allowing the costs to be taxed in the discretion of the court unless otherwise provided by law, it is *Held*, that in actions under the old system peculiarly cognizable in courts of equity the costs shall be awarded in the discretion of the court under the provisions of Revisal, sec. 1267, unless within the class of actions specified in sections 1264 and 1266.

2. Same—Mortgages—Foreclosure Sales—Injunctions.

Where the main purpose of a suit is to restrain the sale of plaintiff's lands under mortgage, held and controlled by the defendant, and to have satisfaction of the mortgage entered of record, it is of an equitable nature; and where it has been judicially determined that the plaintiff owes a balance upon the mortgage debt, but time for redemption has been allowed, and provision made for the sale of the lands upon further default, etc., the taxing of the costs is within the reasonable discretion of the trial judge, and they are not recoverable by the defendant as a matter of right. Revisal, sec. 1267.

APPEAL by plaintiff from *Shaw, J.*, at March Term, 1915, of RANDOLPH.

Civil action. The nature of the case, the verdict, and the facts relevant to the exception presented will sufficiently appear in his Honor's judgment, which is as follows:

This cause coming on for trial at March Term, 1915, of Randolph Superior Court, Hon. T. J. Shaw, judge, presiding.

A jury having been chosen, sworn, and impaneled to try the issues submitted to them, who have answered the same in favor of the plaintiff, as follows:

What amount, if any, is the defendant Louisa Yates indebted to the plaintiff? Answer: Yes; $210.

It is, therefore, on motion of plaintiff's counsel, ordered and adjudged that the plaintiff recover of the defendant Louisa Yates the sum of $210.

It is further ordered that the said sum of $210 is a credit upon
(534) said mortgage, executed by the plaintiff Mavin Yates to the defendant Louisa Yates on 6 December, 1911, which said mortgage was for the sum of $500, with interest from date. Said mortgage being recorded in Book 153, at page 15, in the office of the register of deeds for Randolph County on 26 October, 1912.

It is further ordered that the injunction and restraining order, restraining the defendants, their agents, servants, and substitutes, from selling said property described in the mortgage from the plaintiff to the defendant till the hearing, and recorded in Book K, 53, at page 15, in the office of the register of deeds for said county, be and the same is hereby dissolved.

It is further ordered that the plaintiff Mavin Yates have sixty days to pay the remainder of said mortgage and interest thereon from the adjournment of this court; that upon the failure of the said Mavin Yates to pay said balance of said mortgage and interest thereon within the sixty days as aforesaid, it is ordered that the lands described in the said mortgage be sold at the courthouse door in Randolph County according to the terms and conditions of said mortgage.

It is further ordered that B. F. Britton be and is hereby appointed commissioner to sell said lands if said mortgage with interest thereon is not paid off within the sixty days as aforesaid.

It is further ordered that said commissioner sell said land at the courthouse door in Randolph County and out of the money arising from said sale pay the balance of said mortgage, together with the interest thereon, and pay the costs of recording said mortgage and the advertisement and other costs of said sale, and if any remainder be on hand the same shall be paid to the plaintiff Mavin Yates; and said commissioner

shall report his proceedings by virtue of his office to July Term, 1915, of Randolph Superior Court.

It is further ordered that the plaintiff Mavin Yates pay one-half of the court costs of this action and the defendant Louisa Yates pay one-half of said court costs.

It is further ordered that the plaintiff Mavin Yates pay his costs incurred in this action, and the defendant Louisa Yates pay her costs incurred in this action, to be taxed by the clerk.

THOMAS J. SHAW,
Judge Presiding.

Plaintiff excepted from the judgment taxing plaintiff with any part of costs.

J. A. Spence and H. M. Robins for plaintiff.

Hammer & Kelly and Brittain & Brittain for defendant.

HOKE, J. Our statute on the question of costs in civil cases, (535) now chapter 22 of Revisal, secs. 1264, 1266, and 1267, formerly Code of '83, ch. 10, secs. 525, 526, and 527, among other things, provides, sec. 1264:

1. That costs shall be allowed as of course to plaintiff in the following cases: In actions to recover real property or a claim for title thereto arising on the pleadings or are certified to have been in question at the trial.

2. In actions to recover personal property.

3. In actions of which a court of a justice of the peace has no jurisdiction, unless otherwise provided by law.

Sections 4 and 5 contain provisions as to actions for assault and battery, etc., and as to certain actions on bonds, promissory notes, etc., when several parties are defendant. These subdivisions not being apposite to any question presented on this appeal.

Section 1266 is to the effect that costs shall be allowed as of course to defendants in actions mentioned in the section just quoted, unless plaintiff be entitled to costs therein.

And section 1267: That in other actions costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.

The meaning of subdivision 3 of section 1264 of Revisal, when considered in connection with this last section, 1267, is not clear, nor has it ever been fully and satisfactorily interpreted; but in many well considered decisions of the Court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class

of actions specified in sections 1264 and 1266, in which plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could be awarded in the discretion of the court under the provisions of section 1267. This position was approved as late as 166 Reports, p. 20, in *Bond v. Cotton Mills,* a creditor's bill against the owner and contractor in putting up a cotton mill, in which the principal contractor had become insolvent, and in *Parton v. Boyd,* 104 N. C., 422, an action for specific performance.

In *Smith v. Smith,* 101 N. C., 461, an action to surcharge and falsify the accounts of administrators, and in *Gully v. Macy,* 89 N. C., 343, an action to set aside sale proceedings and decree of the probate court directing a sale of lands, etc. See, also, same case, 81 N. C., 356, for a statement of the nature of the action.

In *Parton v. Boyd, supra,* being an action for specific performance, *Merrimon, J.,* states the ruling as follows: "The cause of action in this case is equitable in its nature, and the action is one in which the court will administer the diverse rights of the parties coming within its scope, as they may appear, giving judgment in favor of the plaintiff in one or more respects, and in favor of the defendants in others, and allow (536) costs in favor of one party or the other, or require the parties to share the same, in its discretion.

This action is not one of those classes of actions in which the plaintiff is entitled to costs, as of course, if he recovers, as allowed by the statute (The Code, secs. 525, 526), or in which the defendant is so entitled if the plaintiff fails to recover. Hence, it is one of those in which costs may be allowed, in the discretion of the court, as allowed by the statute (The Code, sec. 527). The purpose of this provision is to give the court authority, in cases like the present one, to allow costs as the justice of the case may require. *Gulley v. Macy,* 89 N. C., 343.

An examination of *Williams v. Hughes,* 139 N. C., 17, same case, 136 N. C., 58, to which we were referred, will disclose that the cause of action was one in which the title to real estate was involved, and the case comes clearly under the first subdivision of 1264, in which costs were to be allowed to the party who recovered as "of course"; and the same may be said of *Patterson v. Ramsay,* 136 N. C., 561. That was an action of ejectment, and was under the express requirement of subdivision 1, sec. 1264. In the case of *Lumber Co. v. Lumber Co.,* 150 N. C., 281, to which we were also cited as sustaining a different position, the Court was construing a special statute made to wind up the affairs of an insolvent corporation, and in delivering the opinion, *Brown, J.,* is careful to state: "It was not an action brought under the general equity powers of the Court, but a statutory proceeding for the specific purpose, and the payment of costs was governed by the statute."

The only case which we find in real contravention of the ruling of the lower court is that of *Bruner v. Threadgill,* 93 N. C., 225, in which, on an action brought by the mortgagor for an account and redemption of the mortgage, on a balance being found in favor of the mortgagee, a judgment in favor of the mortgagee for the balance and for costs was reversed as to the costs, the Court holding that the mortgagor, having established his principal position, was entitled to his costs as of course.

The principle of that case was directly ignored in a subsequent decision of the Court in *Cook v. Patterson,* 103 N. C., 127, and, in so far as it holds or tends to hold that the costs in a suit, under the general equitable powers of the court, are not in the court's discretion, the decision is not in line with the cases first cited, and is disapproved.

In the old equity procedure the costs of a cause were usually and to a very large extent in the discretion of the chancellor. *Piles v. Redrick,* 167 Pa. St., 296; *Carroll v. Tomlinson,* 192 Ill., 399. And the statute, except in the cases defined and specified, was intended in this respect to confirm the rule in the old equity procedure.

Applying the principle, we think the costs in the present case were clearly in the discretion of the trial court.

It is true that, on the issue of indebtedness submitted, there was (537) verdict in favor of plaintiff and against the defendant for $210, but the form of the issue is not in this case at all determinative of the character of the action.

A perusal of the record will show that the suit was instituted principally to restrain a sale of plaintiff's land under a mortgage, held and controlled by defendant, and to have satisfaction of said mortgage entered of record. The complaint alleged in effect that, in 1909, he had bought a piece of land and taken a deed therefor from Louisa Yates for $170, and for this and certain moneys borrowed he owed said Louisa Yates $300, and had executed a mortgage on the land, and that, under an agreement between plaintiff and defendant, he was to care for and support his grantor, and to be paid therefor, no certain amount being named; that plaintiff had done this for five years and six months; that Louisa Yates was a large, fleshy woman, between 80 and 90 years of age, helpless a great deal of the time, and the amount due for his services was $630, and prayed judgment for $630.

2. That an account be taken and same credited on the mortgage and same cancelled, if "it should amount to that much."

3. That the defendant be enjoined from selling the premises.

Defendant answered, admitting the execution of the mortgage and the purpose to foreclose; denied that there was an agreement to pay the amount for care and support, and denied that plaintiff was entitled to have mortgage satisfied or to have any credits entered on same.

On these pleadings, while the only issue passed upon was that of indebtedness, this was no doubt because all the other determinative facts were admitted, and the controlling issue between these parties and the basic purpose of the action was to decide whether the mortgage was satisfied and whether defendants should be enjoined from selling the land thereunder, and, on these questions, a reference to the judgment will show that a balance is established in favor of defendants and a decree of sale has been entered. The facts present a good illustration of the fairness of the rule of construction, for, while it is urged for plaintiff that the issue tried was one of indebtedness, and the greater part of the costs were incurred on that issue, and plaintiff having prevailed, he should recover the entire costs, it may well be replied, on the part of defendant, that a question also involved was whether there was any balance due giving defendants the right to proceed with the sale, and they were compelled to summon witnesses on the issue to protect their rights under the mortgage, and in this they have succeeded. They have thus prevailed in the controlling features of the case. The questions of redeeming a mortgage and of injunctive relief were both of recognized equitable cognizance (*Owens v. Wright,* 161 N. C., 127; *Parton v. Boyd,*
104 N. C., 422), and under these and other authorities heretofore
(538) cited with approval the costs were clearly within his Honor's discretion, and we do not see that it has been improperly exercised.

The judgment below will be affirmed.

No error.

Cited: Van Dyke v. Ins. Co., 174 N. C. 79 (g); *Hare v. Hare,* 183 N. C. 421 (1f); *Ritchie v. Ritchie,* 192 N. C. 541 (g).

PAULINE ALLEY ET AL. V. DAVID ROGERS.

(Filed 22 December, 1915.)

1. Reference—Pleas in Bar—Limitation of Actions.

A plea in bar must be to the "whole action" or to the "entire cause of action," to require that it be determined before reference ordered; and when it appears that the reference involved taking a mutual account between the parties, of long standing, for services charged and payments made, extending to a short time before the commencement of the action, a reference was proper; and upon the findings of the referee, confirmed by the trial court, in this case, the action was not barred by the statute. *Stancil v. Burgwyn,* 124 N. C., 69.

2. Reference—Jury—Waiver.

A party objecting to a compulsory reference waives his right to a trial by jury by failing to assert it definitely and specifically in each exception to the report and to file the proper issues he desires to be submitted to them.

3. Reference—Findings—Appeal and Error.

Findings of fact by the referee, supported by sufficient evidence and confirmed by the trial judge, are conclusive on appeal.

APPEAL by defendant from *Cline, J.*, at February Term, 1915, of JACKSON.

Civil action upon exceptions to referee's report. His Honor overruled defendant's exceptions, confirmed the report, and rendered judgment for plaintiff. Defendant appealed.

C. C. Cowan, Alley & Leatherwood for plaintiff.

Moore & Moore, Bourne, Parker & Morrison and Theodore F. Davidson for defendant.

BROWN, J. We will not consider *seriatim* the thirty-four assignments of error in the record, but only those salient points determinative of the case. The action was commenced 13 March, 1913. The plaintiffs complain that from 15 March, 1895, until 15 October, 1911, at the request of the defendant, they furnished to him board, food, lodging, attendance, and other necessaries, doing his mending, laundry, and furnishing food and lodging for his laborers on his farms and his many business visitors during said period, and feed for his visitors' teams, and in every year of said period the defendant made payments on (539) the account of said services, directing the same to be credited on the running account between them, the total of which said payments amounts to $411.83, and that the services of the plaintiffs rendered to the defendant during said period were reasonably worth the sum of $2,885.03, leaving a balance due the plaintiffs of $2,573.17.

The defendant answered, admitting the services rendered and admitting that he made payments from time to time, and insists that the payments which he made were reasonably worth what the services would reasonably amount to, and attempted to plead the statute of limitations.

The evidence shows that payments were made by the defendant on this account during the entire period, some in each year, the last two being, the year 1912, $10, and the year 1913, $10.

1. The court ordered a compulsory reference. The defendant contends that the statute of limitations is properly pleaded in bar of a recovery, and that it was error to refer the cause before determining this plea.

We doubt if the plea is well pleaded. *Murray v. Barden,* 132 N. C., 136; *Lassiter v. Roper,* 114 N. C., 20.

However that may be, it is not a bar to the whole cause of action set out in the complaint. It does not necessarily bar the entire cause of action, for it is alleged that the defendant made payments upon a running and mutual account up to 1913.

As the statute of limitations in this case involves mixed questions of law and fact, it was necessary to take and state the account. Upon the facts as found by the referee, the statute does not bar a recovery. *Stancil v. Burgwyn,* 124 N. C., 69-71.

In those cases where this Court has held that a reference should not be made when there is a plea in bar, the plea constituting the bar has extended to the whole action, and the Court seems to have been particular to have used the term "whole action" or "entire cause of action." *Oldham v. Rieger,* 145 N. C., 254; *Duckworth v. Duckworth,* 144 N. C., 620; *Jones v. Wooten,* 137 N. C., 421; *Bank v. Fidelity Co.,* 126 N. C., 320; *Comrs. v. White,* 123 N. C., 534.

2. The defendant contends that the court erred in denying him a trial by jury. If defendant desired to preserve his right to a jury trial he should have formulated the issues arising upon his exceptions and filed them at the time of filing his exceptions.

The Court finds that no such issues were made, tendered, attached to or filed with said exceptions. Some issues appear in the printed record, but by examination it will be seen that these are no part of the record or of the case on appeal, and, as appears from the certificate of the clerk thereto appended, were not filed until two months after defendant's exceptions were filed.

(540) It has been frequently held that although a party duly enters his objection to a compulsory reference, he may waive it by failing to assert such right definitely and specifically in each exception to the referee's report and by their failing to file the proper issues. *Driller Co. v. Worth,* 117 N. C., 515, and cases cited in annotated edition; *Keerl v. Hays,* 166 N. C., 553.

3. It is contended that there is no sufficient evidence to sustain the findings of fact. The weight of the evidence is not for us to pass on. An examination of the record discloses abundant competent evidence to sustain the allegations of the complaint and the findings of the referee. These findings were confirmed by the judge, and the conclusions of law necessarily follow from such a state of facts. The judgment is

Affirmed.

Cited: Marler v. Golden, 172 N. C. 825, 826 (1f, 3f); *Robinson v. Johnson,* 174 N. C. 234 (2f); *Baker v. Edwards,* 176 N. C. 232 (2f);

Lumber Co. v. Pemberton, 188 N. C. 537 (1f); *Bank v. McCormick,* 192 N. C. 44 (1f); *Booker v. Highlands,* 198 N. C. 286 (2f); *Cotton Mills v. Maslin,* 200 N. C. 329 (2f); *Supply Co. v. Banks,* 205 N. C. 344 (1g); *Reynolds v. Morton,* 205 N. C. 493 (1f); *Texas Co. v. Phillips,* 206 N. C. 358 (2f); *Gurganus v. McLawhorn,* 212 N. C. 410 (2f); *Brown v. Clement Co.,* 217 N. C. 52 (1f); *Grimes v. Beaufort County,* 218 N. C. 166 (1f).

JOHN H. MARTIN ET AL. v. C. H. REXFORD ET AL.

(Filed 22 December, 1915.)

Conversion—Claim and Delivery—Principal and Surety—Damages—Malicious Prosecution—Several Causes—Demurrer.

Where it is alleged that, in a former action, the defendants sued out claim and delivery, seized the plaintiff's property, in which the plaintiff has obtained final judgment in his favor, but that the defendant wrongfully, unlawfully, etc., had converted the property to his own use: *Held,* the plaintiff may recover his damages in an independent action against the defendant, and, *ex contractu,* against his sureties on his bond, and where the writ has been sued out willfully, maliciously, and wantonly, punitive damages against the principal defendant alone; but where the latter damages are sought against all in the same action, the causes should be severed, and a demurrer is bad.

APPEAL by defendants from *Webb, J.,* at July Term, 1915, of SWAIN.

Civil action heard upon demurrer. From the judgment overruling the demurrer defendants appealed.

Alley & Leatherwood for plaintiff.

W. L. Taylor, Frye & Frye for defendants.

BROWN, J. The complaint alleges that in a certain civil action prosecuted by defendants against plaintiffs, the defendant sued out a claim and delivery proceeding, writ of attachment and injunction, and levied said writs upon plaintiff's property and appropriated the same to defendant's use.

The plaintiffs further allege that the said proceedings upon the part of the defendants were "wrongful, unlawful, vexatious, annoying, malicious, and without probable cause," and prayed judgment for the sum of $3,500 damage.

The plaintiffs further aver that the said action has been termi- (541) nated in favor of the plaintiffs by judgment of the Superior Court

of Swain County, duly affirmed by the Supreme Court of this State.

The principal ground of demurrer is that if any damages were sustained in such action by the wrongful suing out of the said proceedings, they could only be ascertained by motion in the original action, and that they are not properly the subject of an independent action. We think his Honor properly overruled the demurrer.

We have held that where attachments and kindred proceedings are issued and levied upon the property of the defendant without probable cause, the plaintiff is liable to the defendant for the damages sustained, and that they may be recovered in a separate action against the plaintiff, as well as upon his undertaking. *Tyler v. Mahoney,* 166 N. C., 509.

But the sureties upon the undertaking are only liable *ex contractu* for the actual damages sustained, while the party suing out the writ willfully, maliciously, and wantonly would be liable not only for actual damages, but in tort for punitive damages in case a jury should see fit to award them. Therefore, the action in tort will not lie against the sureties on the undertaking, and the two cannot properly be joined.

But it does not follow that the demurrer should be sustained and the action dismissed because under The Code the court in the case of a misjoinder of causes of action shall order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned. *R. R. v. Hardware Co.,* 135 N. C., 78.

The complaint in this case is not as definite and certain as it might be. If the plaintiffs desire to prosecute the defendants *ex delicto* for a malicious prosecution, and also to prosecute the sureties upon the undertaking in the attachment and claim and delivery proceeding for the value of the property and actual damages sustained, then it is in order to divide the action and file separate complaint in each case.

Affirmed.

Cited: Davis v. Wallace, 190 N. C. 548 (g).

JOHN T. MOODY v. M. L. WIKE ET AL.

(Filed 22 December, 1915.)

1. Pleadings—Demurrer—Speaking Demurrer.

A demurrer to the complaint pleading the statute of limitations as a defense calls in aid matters extraneous to the pleading demurred to, and is called a "speaking demurrer," which is bad and not allowable. Revisal, sec. 361.

2. Judgments—Fraud.

Where the parties have agreed to compromise an action, and the judgment entered is attacked for fraud or imposition in an independent action, as not being in conformity with the agreement entered into, it is immaterial that the alleged fraud was not repeated when the court signed the judgment, for it is considered as having continued from the date of its origin to the rendition of the judgment, and then operating upon the party, in the absence of allegation to the contrary.

3. Same—Independent Action—Fraud on Court—Motions in the Cause.

An independent action to set aside a judgment for fraud in its procurement is a proper remedy, and the judgment may be attacked by motion in the original cause when it has been obtained by fraud practiced upon the court.

4. Pleadings—Judgments—Fraud—Allegations Sufficient—Demurrer.

The plaintiff in his action to set aside a judgment alleged that he and the defendant agreed upon a compromise judgment to be entered by consent wherein the defendant was to receive about 2 acres of the land in controversy; that during his sickness he directed that the judgment be drawn to carry out the agreement, he being represented by his attorney, who was ignorant of the terms, and that upon representations of the defendant made to his own and the plaintiff's attorney, and with intent to deceive and to defraud the plaintiff, he deliberately and falsely caused other boundaries to be incorporated in the judgment, which included a much larger acreage: *Held*, these allegations, if sustained, were sufficient to set aside the judgment consequently entered, for fraud; and upon demurrer they are taken to be true.

APPEAL by defendants from *Cline, J.*, at May Term, 1915, of (542) JACKSON.

Civil action heard on demurrer to the complaint.

Plaintiff alleged substantially that at October Term, 1909, of said court a suit was pending between M. M. Wike as plaintiff and John T. Moody, plaintiff in this cause, as defendant, and during the trial thereof it was agreed that M. L. Wike be made a party plaintiff, which was done, and thereafter it was further agreed that the case be compromised and settled upon the terms that the plaintiff M. M. Wike should abandon his claim for damages, and, in consideration thereof, John T. Moody should convey to M. L. Wike a piece of land described by metes and bounds and containing about 2 acres, which was then claimed by M. L. Wike. The plaintiff John T. Moody was very sick at the time of drawing and entering the consent judgment or the compromise, and notified counsel for the plaintiffs in that case that his attorney would represent him. The judgment was prepared by said plaintiffs and their counsel in the latter's office, where the plaintiff M. L. Wike, well knowing the terms of the agreement and the boundaries of the land intended and

agreed by the parties to be conveyed to him by the plaintiff, with the intent to deceive and mislead his own attorney, who was ignorant of the lines and boundaries of the land, and the plaintiff's attorney, who was not familiar with the said lines and boundaries, and with the dishonest intent to obtain more land than was agreed to be conveyed to him, falsely, knowingly, and fraudulently represented to his own counsel, who was at the time drawing the judgment, the lines and boundaries of the land, and falsely and deceitfully dictated to him the lines and
(543) boundaries which were inserted in the judgment, with intent to defraud the plaintiff in this suit, defendant in that case, of land which was not included in the compromise, or intended by the parties to be covered by the consent judgment. That the counsel of M. L. Wike innocently stated to this plaintiff's counsel, who was not present when the judgment was drawn, that it was correctly drawn according to the agreement, believing that this had been done, and the judgment was accordingly entered by the court. That M. L. Wike has since died, and defendants, his heirs, though requested to do so, both by their own counsel and this plaintiff, have refused to correct said judgment so as to make it conform to the true agreement, and still refuse to do so, and that by reason thereof the judgment now embraces about five or six times more land than was intended by the parties to be conveyed to M. L. Wike. The prayer is that the judgment be vacated and set aside and for damages.

Defendants demurred on the following grounds:

1. This suit was brought nearly six years after the rendition of the judgment.

2. It was a consent judgment and duly and regularly signed by the attorneys and the presiding judge.

3. That plaintiff cannot bring an independent action to set aside the judgment, but should have proceeded in the cause.

4. That there is no allegation that there was any false representation or fraud practiced by M. L. Wike at the time the consent judgment was signed by counsel of the parties and the presiding judge, and that the allegation that the judgment was fraudulently obtained is an unauthorized conclusion from the facts stated.

The court sustained the demurrer, and plaintiff appealed.

J. J. Hooker for plaintiff.

J. Frank Ray and Moore & Moore for defendant.

WALKER, J., after stating the case: We will consider the grounds of demurrer in the order stated.

First. The statute of limitations cannot be pleaded in a demurrer, but must be taken advantage of only by answer, by express provision

of the statute, Revisal, sec. 360. In *Bacon v. Berry,* 85 N. C., 125, the defendant demurred because more than seven years had elapsed since the rendition of the judgment when the suit was commenced, which is identical with the matter pleaded here. The Court held (by *Ashe, J.*) that "It was, in fact, a plea of the statute of limitations, which must be set up in the answer, it being an objection that can never be taken by demurrer," citing *Green v. R. R.,* 73 N. C., 524. If the facts are admitted, the court may pass on the question of the bar, as in *Ewbank v. Lyman, ante,* 505. It was held in *Long v. Bank,* 81 N. C., at p. 46, that even if the statutory bar is apparent on the face of the (544) complaint, it could not be pleaded except by answer, and not by demurrer or motion to dismiss. The same was held in *Oldham v. Rieger,* 145 N. C., at p. 259, and the reason why such a thing cannot be done is fully stated, in addition to the positive requirement of the statute as the best of reasons, and a demurrer alleging that time had elapsed was in that case characterized as a "speaking demurrer," that is, one not addressed to the statements of the complaint alone, but calling in aid extraneous facts, which is forbidden by the law of pleading. See, also, Pell's Revisal, sec. 361, at p. 141, and note, where the numerous cases are collected.

Second. It makes no difference that the alleged fraud was not repeated when the judgment was actually signed, for it is to be taken as having continued from the date of its origin down to that time, and to be then operating upon the party, there being no allegation to the contrary. If it caused the plaintiff's attorney in that action to sign the judgment, in ignorance of its existence, it matters not when the fraud was committed. Black on Judgments, sec. 321.

Third. When a cause is closed by a final judgment, a proper remedy is to proceed by an independent civil action to set it aside if it was procured by fraud. 23 Cyc., 917, 918; Black on Judgments, sec. 368, 370, 371; *Rollins v. Henry,* 78 N. C., 342; *Uzzle v. Vinson,* 111 N. C., 138; *Sharpe v. R. R.,* 106 N. C., 308 (19 Am. St. Rep., 533); *Syme v. Trice,* 96 N. C., 243; *Fowler v. Poor,* 93 N. C., 466. And this rule applies to judgments by consent, 16 Cyc., 502, and notes; Black on Judgments, sec. 319; *Kerchner v. McEachern,* 93 N. C., 447; *Bank v. McEwen,* 160 N. C., 414; *Rollins v. Henry* and other authorities *supra.* It was said in *McEachern v. Kerchner,* 90 N. C., 177, 179: "If a party to such a judgment complains of it because of inadvertence, mistake, accident, or fraud in the agreement to have it entered of record, he can have redress only by consent of all the parties, or by an action instituted for that purpose, making all proper parties, independent of the action in which such judgment was entered. In such independent action he can allege and set forth such grounds of complaint against such judgment

as he may have, and the court can grant such relief as he may be entitled to."

Whether the plaintiff could, at his election, have proceeded by motion in the cause, even after final judgment entered, we need not discuss, as the remedy by a separate civil action is a proper one. We will direct attention, though, to the cases of *Roberts v. Pratt,* 152 N. C., 731; *Massie v. Hainey,* 165 N. C., 174, where the question is fully considered by *Justice Hoke,* and to *Bank v. McEwen,* 160 N. C., 414. A party can undoubtedly proceed by motion where the fraud is practiced upon the court. *Roberts v. Pratt, supra.*

(545) Fourth. The plaintiff alleges facts which constitute a fraud upon him in procuring the judgment to be signed and entered of record. M. L. Wike knew the boundaries of the land which the parties had agreed should be inserted in the judgment, and he, with intent to deceive and mislead his own attorney and thereby to defraud the plaintiff, deliberately and falsely dictated other boundaries and another description to his counsel, so that the judgment would embrace 10 or 12 acres instead of about 2 acres. Fraud has been said to consist in one man's endeavoring by deception or circumvention to alter the general or particular rights of another. 1 Bigelow on Fraud (Ed. 1890), p. 5. This case falls within the definition, as the defendant's ancestor committed an act of deceit for the purpose of misleading and circumventing the plaintiff, so that his rights would be altered by his being led to do something different from the agreement of the parties. The demurrer, of course, admits all the facts alleged in the complaint, and our decision is based upon that admission. There was error in sustaining the demurrer.

Reversed.

Cited: Lyman v. Coal Co., 183 N. C. 587 (3f); *Wadford v. Davis,* 192 N. C. 488 (3g); *Currin v. Currin,* 219 N. C. 817 (1g).

MRS. AMANDA ROBINSON v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS.

(Filed 12 January, 1916.)

1. Insurance—Fraternal Orders—Rules—Waiver—Estoppel.

A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and by-laws, unless the defect has

been waived by the company or it is in some way estopped from insisting on the forfeiture.

2. Same—Dual Relationship—Insurer and Insured.

A member of a fraternal order holding a policy of life insurance or benefit certificate in its insurance department occupies a dual relationship towards the company; for, as a member he is bound by the rules and proceedings of the order regularly taken, and as a holder of one of the policies he stands towards the company, under his policy, in the relationship, in most respects, of insurer and insured, and subject to the principles prevailing in that class of contracts.

3. Principal and Agent—Known Restrictions.

While a contract within the apparent scope of an agent's powers may ordinarily be enforced against the principal, this position is not allowed to prevail where the contract is in violation of express restrictions on the agent's authority, and these restrictions are known to the party dealing with him; for in such case the latter may not insist on the validity of such a contract as against the principal.

4. Same—False Representations—Estoppel—Insurance—Fraternal Orders.

Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in the constitution and by-laws of the company, and there is evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the company is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that the agent of the company also knew that the applicant's statements were false.

5. Insurance—Principal and Agent—Imputed Knowledge—Local Agents—Issues—Instructions—Appeal and Error.

In this action to recover upon a policy of life insurance claimed by the defendant to be invalid because of material and false representations made in the application for it, it is *Held*, that knowledge of the local medical examiner authorized to ascertain the facts was knowledge imputable to the company, and that the data on file at the home office may also affect the company with notice.

APPEAL by defendant from *Lyon, J.*, at February Term, 1915, (546) of GUILFORD.

Civil action to recover on a policy of insurance.

On the trial it was made to appear that in November, 1911, Adolphus Robinson died, being a member of defendant order and holding a policy of insurance therein or a beneficiary certificate for $2,000, of date 1907, plaintiff being the beneficiary, and that proper proof of such contract and death had been duly made; that payment of said certificate was refused by defendant on the ground, established by the verdict, that said Adolphus Robinson, in making the application in 1907, on which he

had obtained the certificate, falsely represented himself to be 35 years of age when he was, at the time, 50 years old or more. The constitution and by-laws of defendant were put in evidence, containing a provision that persons over 45 years of age could not participate in the beneficiary department, and the depositions of A. H. Hawley, general secretary and treasurer of the order, and of W. B. Cary, grand medical examiner, the officers having charge and control of this insurance department, were also introduced, containing testimony to the effect that they had issued the policy or certificate in question on the statements in the application at the time same was issued; that they had no knowledge that deceased was over 45 years of age and that they would not have issued the policy or certificate if this had been known to them. It further appeared that when the application of the deceased was forwarded to the Grand Lodge, the questions touching the age of the applicant, his occupation, etc., were unanswered; that the secretary and medical examiner, having perceived this omission, returned the application to the medical examiner of the local lodge, who, by the laws of the order, was to fill out the answers, as directed by the applicant, and attention was called to the omitted answers by an index hand, pointing to each, on the margin of the application, and, on the return of the application properly filled and giving the age of the applicant as 35, the policy was issued. The local examiner testified that he filled
(547) the omitted and other answers just as directed by the applicant, and in support of the testimony of these parties the original application was produced, showing an entry stamped thereon and attached thereto and giving indication that it had been returned for correction as testified by the witnesses.

It was proved further by defendant's witnesses that before or at the time of refusing payment the defendant had made proper tender of repayment of the fees and dues which had been paid on the certificate during the membership of the deceased.

In reply to this there was evidence on the part of plaintiff tending to show that the medical examiner of the local lodge could or should have seen from the appearance of the applicant that he was over 45 years of age at the time of application made, and, furthermore, that in the same application containing the statement that the deceased was 35 years of age deceased had, in answer to another question, stated that he had formerly been a member of the order, from Lodge No. 457, and that his membership had lapsed in 1893, and that pursuant to notice in the present cause, duly issued, defendant had produced from the files of the Grand Lodge the application made by deceased at the time of his former admission to the order, and in that his age had been truly stated,

that application having been made in 1891 and his age then given as 34 years.

It was shown further that deceased, holding the certificate, had continued to pay the regular dues and otherwise act as a member of the order, holding his said certificate from his last admission in 1907 till his death in November, 1911.

On this evidence for and against the claim and appropriate pleadings in affirmance and denial of liability, the following issues were submitted and responded to by the jury:

1. Did the defendant issue to Adolphus Robinson its beneficiary certificate in the sum of $2,000, as alleged in the complaint? Answer: "Yes."

2. Is plaintiff the widow of the said Adolphus Robinson and the beneficiary in the said certificate Answer: "Yes."

3. Was the insured, Adolphus Robinson, above 45 years of age at the time of making application for the beneficiary certificate sued on? Answer: "Yes."

4. Were the representations as to the age of insured fraudulently made by said Adolphus Robinson with the intention to deceive the defendant, and was the defendant thereby deceived? Answer: "No."

5. If Adolphus Robinson was above 45 years of age at the time of filing the application, did the defendant at the time of filing said application or of the issuance of the certificate thereon, or at the time of the receipt of the last premium, know that the said Adolphus Robinson was above 45 years of age when the application was (548) filed? Answer: "Yes."

6. Under the rules and regulations of the defendant was the said Adolphus Robinson ineligible for membership in the beneficiary department of the defendant? Answer: "Yes."

7. If so, did the defendant waive such rules and regulations? Answer: "Yes."

8. If the said Adolphus Robinson was ineligible for membership in the beneficiary department of the defendant, is the defendant estopped to set up his ineligibility therein? Answer: "Yes."

9. What amount, if any, is plaintiff entitled to recover of the defendant on account of said beneficiary certificate? Answer: "$2,000 and interest from 15 November, 1911, to date."

There was judgment for plaintiff, and defendant excepted and appealed.

Brooks, Sapp & Williams for plaintiff.

J. I. Scales for defendant.

HOKE, J., after stating the case: There being evidence tending to show that the policy or certificate sued on was issued contrary to the rules and regulations of the defendant company as contained in its constitution and by-laws, the same cannot be recovered on unless this defect has been in some way waived or the company is estopped from insisting on a forfeiture. Speaking, then, to the facts as established by the verdict, it is the recognized position in this State that in one of these fraternal organizations having an insurance department as one of its features a member holding a policy of insurance or benefit certificate occupies a double relationship towards the company. As a member he is bound by the rules and proceedings of the order, regularly taken, but as a holder of one of the policies he stands, and under his policy the relationship, in most respects, is that of insurer and insured and subject to the principles ordinarily prevailing in that class of contracts. *Bragaw v. Supreme Lodge,* 128 N. C., pp. 354-357; *Peterson v. Gibson,* 191 Ill., 365. Considering the record in that aspect, it has been held in several cases with us, and the ruling is well supported by authority elsewhere, that when a policy has been obtained on application of the insured, and the same contains false statements, material to the risk, and the company, with full knowledge of the facts and the falsehood, issues a policy, receives the premiums, and recognizes and continues to recognize the applicant as holding a contract of insurance, it will ordinarily be estopped from insisting on a forfeiture of the policy that might otherwise ensue. *Fishblate v. Fidelity Co.,* 140 N. C., pp. 589-595; *Gwathney v. Ins. Co.,* 132 N. C., 925; *Grabbs v. Ins. Co.,* 125 N. C., 389; *Horton v. Ins. Co.,* 122 N. C., 498; *Follett v. Accident Assn.,* 110
(549) N. C., 377; *Bergeron v. Ins. Co.,* 111 N. C., 45; *Ins. Co. v. Goyne,* 79 Ark., 315; *Ins. Co. v. Galligan,* 71 Ark., 295; *Ins. Co. v. Vogel,* 166 Ind., 239.

But this principle, we apprehend, will be found to exist chiefly in reference to the terms of the contract between the parties or the adjustment of rights thereunder where the policies of an incorporated company are issued through a general agent, having full power in the premises or where the agent, though one of restricted powers, has issued the policy in the course and scope of his agency and to an applicant who has no notice of the limitations upon his powers. *Gwaltney v. Ins. Co., supra; Miller v. Ins. Co.,* 31 Iowa, 216; *Ins. Co. v. Wilkinson,* 80 U. S., 222. And we see no reason why, in a case of limited or restricted agency, the general doctrine applicable should not prevail, to the effect that one who deals with an agent of that kind, having notice of restrictions put upon his power, is bound by such limitations and may not insist on a contract which he knows is in excess of the power conferred. *Wynne v. Grant,* 166 N. C., 39; *Stephens v. Lumber Co.,*

166 N. C., 107; *Swindell v. Latham,* 145 N. C., 144; *Bank v. Hay,* 143 N. C., 326; *Building and Loan Assn. v. Home Savings Bank,* 181 Ill., 35; *Ins. Co. v. Wilkinson, supra.*

In the present case the agents acting for the company, while having general charge and control of the insurance department, were prohibited by express provision in the constitution and by-laws from issuing any certificate to a member over 45 years of age at the time of his application, and there are facts in evidence tending to show that the applicant was aware of this limitation on the agent's powers, and falsely represented his age as 35 years. While the knowledge of the company of the falsity of this statement might, under the decisions heretofore cited, prevent defendant from insisting on such representations as a feature of the contract between the parties, it does not, to our mind, prevent the operation of the principle that one dealing with an agent of restricted powers and having notice or knowledge of existent limitations is bound by them.

As said in the recent case of *Woodly v. Telephone Co.,* 163 N. C., 284: "In order to a valid waiver, there must be an agreement founded on sufficient consideration or some element of estoppel *in pais.*" And if the applicant attempted to make a contract with the agents of defendant when he had notice or knowledge that they were acting in excess of their powers, and particularly if he procured the contract by reason of his own false statements, no recovery should be allowed on such a contract.

There could be no waiver by agreement, for an utter want of capacity in the agents to make it, nor by estoppel, for that would clearly not arise to one who was aware of the agent's lack of power. True, there are many well considered decisions to the effect that limi- (550) tations on the powers of an agent will only avoid a policy of insurance when they are contained in the legislative charter of the general law affecting the contract, *Wood v. Mystic Order,* 212 Ill., 532; *In re Assignment Mutual Ins. Co.,* 107 Iowa, 143; but these were cases applying the doctrine of *ultra vires,* by which the contracts were avoided whether the applicant had notice of the limitation or not, and there is nothing in these decisions which militates against the enforcement of conventional limitations when, as stated, the applicant may have known of the agent's lack of power to make the contract.

His Honor's ruling, to the effect that notice of the applicant's age to the local medical examiner, acting in this particular matter for and by authority of the central lodge, would be imputed to the company, is in accord with authoritative decisions here and in other jurisdictions, *Bragaw v. Supreme Lodge, supra; Grabbs v. Ins. Co.,* 125 N. C., *supra; Knights of Pythias v. Withers,* 177 U. S., 260; *Johnston v. Ins. Co.,*

123 Ga., 404; and there is also authority for the position as expressed by him, that data on the official files of the company, received in former dealings with the applicant, giving his correct age, etc., may, at times and on some issues, affect the company with notice, *O'Rourke v. Ins. Co.*, 23 R. I., 457; *Ins. Co. v. Nichols,* Court Civ. App., Texas, 26 S. W., 998; but he committed reversible error in making, as he did in his charge, the determination of the seventh and eighth issues to depend entirely on the response to the fifth issue, that is, on the knowledge the company, through its agents, may have had of the falsity of the applicant's statements at the time the policy was issued, for, though the company may have known this, the policy being in excess of the powers conferred upon these agents, if the applicant was aware of this at the time, he could insist neither on the principle of waiver by agreement nor estoppel.

For the error indicated, there will be general new trial, and this will be certified, that the cause may be properly determined on these or other issues properly determinative of the controversy.

New trial.

Cited: Robinson v. Brotherhood of L. F. & E., 172 N. C. 853 (Sc, f); *Baker v. R. R.*, 173 N. C. 371 (5f); *Hart v. Woodmen,* 181 N. C. 490 (5f); *Ins. Co. v. Lumber Co.*, 186 N. C. 270 (5f); *Short v Ins. Co.*, 194 N. C. 650 (5g); *Thompson v. Assurance Society,* 199 N. C. 64 (3f); *Winchester v. Brotherhood of R. R. Trainmen,* 203 N. C. 745 (g).

(551)

GILLIARD EDWARDS, ADMINISTRATOR, v. INTERSTATE CHEMICAL COMPANY.

(Filed 12 January, 1916.)

1. Death, Wrongful—Interpretation of Statutes—Survival of Action.

Revisal, sec. 59, changes the common-law rule by conferring a right of action against one who has wrongfullly caused the death of another, and where the injured party has received in his lifetime full compensation for the injury which resulted in his death, a right of action arising from the same injury will not lie after his death for further damages for the benefit of his estate, the same neither existing at common law nor conferred by a reasonable interpretation of the language of the statute.

2. Same—Pleadings.

Where it appears from the pleadings in an action brought under the provisions of Revisal, sec. 59, for damages for a wrongful death, that the answer pleads a recovery by the party injured, before his death, upon

the same cause of action, and that his judgment had been paid, to which the plaintiff demurred, it is *Held*, that the demurrer admitted the facts stated in the answer, and the present plaintiff, administrator of the deceased, cannot recover.

APPEAL by plaintiff from *Webb, J.*, at September Term, 1915, of MECKLENBURG.

Civil action to recover damages for death of intestate, caused by alleged negligence of defendant company.

The facts relevant to the inquiry are sufficiently embodied in the judgment of his Honor overruling the demurrer, in terms as follows:

"This cause coming on to be heard before his Honor, James L. Webb, judge presiding at said September Term, 1915, of the Mecklenburg Superior Court, and being heard upon the complaint filed by the plaintiff, the answer filed by the defendant, and the demurrer filed by the plaintiff to the further defense set up in defendant's answer, and it appearing to the court from the pleadings referred to that this action is brought by the plaintiff on account of the death of intestate, alleged to have been caused by the negligence of the defendant, and it appearing from the further defense set up in the defendant's answer that the plaintiff's intestate, Jesse Edwards, prior to his death, brought an action for damages on account of the same injuries involved in the present action, which the plaintiff in this action alleges resulted in her intestate's death; that the said action of Jesse Edwards v. Interstate Chemical Corporation was duly tried and judgment rendered therein for the plaintiff, and that said judgment has been duly satisfied by the defendant, all of which will more fully appear by reference to the further defense set out in the defendant's answer, the plaintiff having filed a demurrer to said further defense admitting the truth of the allegations contained therein: Now, therefore, it is hereby considered, ordered and adjudged that the said demurrer, filed by the plaintiff, be overruled, and that the plaintiff's action be and it hereby (552) is dismissed by order of the court."

Plaintiff excepted and appealed.

E. R. Preston and Duckworth & Smith for plaintiff.

John M. Robinson for defendant.

HOKE, J. The question presented in the record has been much considered by the courts, and it has been very generally held, a position in which we fully concur, that the statute conferring a right of action for wrongfully causing the death of another, usually to be prosecuted by the personal representative, does not and was not intended to confer such right when the intestate, the injured party, had been compensated

for the injury during his life and had received such compensation in full adjustment of his claim.

The legislation on the subject in this country is, to a large extent, modeled upon an English statute, commonly known as Lord Campbell's Act, 9 and 10 Vic., ch. 93, our own law, Revisal, secs. 59 and 60, being substantially a reproduction of the English statute, and the construction put upon the law in England was that the action would not lie if the injured party had, during his life, received satisfaction for the wrong; these courts being of opinion that it was the purpose and meaning of the statute to deprive the wrongdoer of the protection oftentimes afforded by reason of the common-law principle that actions of this character died with the person. *Read v. Great Eastern Ry.*, Law Reports, 3 C. Q. B. (1867 and 8), p. 555. In that action it was shown that the injured party, deceased, had accepted a sum of money in full satisfaction for the wrong, and the plea in bar was held a good defense. *Blackburn, J.*, delivering the principal opinion, said, in part: "Before that statute (Lord Campbell's Act), the person who received a personal injury and survived its consequences could bring an action and recover damages for the injury; but if he died from its effects, then no action could be brought. To meet this state of the law, the act of 9 and 10 Vic. was passed," etc.; and *Lush, J.*, concurring, said, in part: "I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in case where the maxim, *Actio personalis moritur cum persona*, would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer." This construction of the law has been very generally adopted by the courts of this country, whether the statutory action is considered a new right or a continuation of the old, and there is very little to be added to the cogent reasoning which they have presented in support of the position. *Littlewood v. Mayor*, 89 N. Y., 24; *Telephone Co. v. Cassin*, 111 Ga., 575; *Thompson v.* (553) *R. R.*, 97 Texas, 590; *Price v. R. R.*, 33 S. C., 556; *Hecht v. R. R.*, 132 Ind., 507; *Mooney v. Chicago*, 239 Ill., 414. And cases in Supreme Court of the United States and text-books of approved excellence recognize and approve the principle. *Michigan Cent. Ry. v. Vreeland*, 227 U. S., pp. 59-70; Tiffany on Death by Wrongful Act (2 Ed.), sec. 124; 3 Elliott on Rys. (2 Ed.), sec. 1376; 8 A. and E. Enc., p. 870; 13 Cyc., p. 325.

In the citation to Tiffany the author says: "If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him in damages for the personal injury, this will operate equally as a bar in an action by his personal representative for his death. Thus,

a release by the injured party of his right of action or a recovery of damages by him for the injury is a complete defense in the statutory action."

In *Vreeland's case, Associate Justice Lurton,* delivering the opinion, said: "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the *new action* is a right dependent upon the existence of a right in the decedent, immediately before his death, to have maintained an action for his wrongful injury.

A very satisfactory statement of the principle and the reasoning upon which it is properly made to rest will be found in the New York case of *Littlewood v. Mayor, supra,* where *Rapallo, J.,* delivering the opinion, in part, said: "The counsel for the plaintiff is sustained by the authorities in the proposition upon which he mainly bases his argument in this case, viz., that the right of action given by the act of 1847 to the personal representatives of one whose death has been caused by the wrongful act, neglect, or default of another is a new right of action created by the statute, and is not a mere continuation in the representatives of the right of action which the deceased had in his lifetime. But it seems to me that this is not the point upon which the case turns, and that the true question is whether, in enacting the statute, the Legislature had in view a case like the present, where the deceased, in his lifetime, brought his action, recovered his damages for the injury which subsequently resulted in his death, and received satisfaction for such damages; and whether it was intended to superadd to the liability of a wrongdoer, who had paid the damages for an injury, a further liability, in case the party afterward died from such injury, for the damages occasioned by his death, to his next of kin; or whether the intention of the statute was to provide for the case of an injured party who had a good cause of action, but died from his injuries without having recovered his damages, and in such case to withdraw from the wrongdoer the immunity from civil liability afforded him by the common-law rule that personal actions die with the person, and to give the statutory action as a substitute for the action which the deceased (554) could have maintained had he lived.

"There can be no doubt that the Legislature had power to create the double liability contended for, nor would it necessarily involve any inconsistency. The damages of the party injured are different and distinguishable from those which his next of kin sustained by his death, and no double recovery of the same damages would result. But it is equally clear that the Legislature might give to the representative the statutory right of action, only as a substitute for the damages which

the deceased was prevented by his death from recovering, and the question now is, What was their intention in this respect?

"The language of the act plainly indicates, I think, that the framers had in view the common-law rule, *'Actio personalis,'* etc., and that their main purpose was to deprive the wrongdoer of the immunity from civil liability afforded by that rule. The gist of the first section is that the wrongdoer 'shall be liable to an action for damages, notwithstanding the death of the person injured, and though the death shall have been caused under such circumstances as amount in law to a felony.' It does not provide that the wrongdoer shall be liable notwithstanding that he shall have satisfied the party injured, or notwithstanding that the latter has recovered judgment against him, or notwithstanding any other defense he might have had at the time of the death, but merely that the death of the party injured shall not free him from liability; showing that this is the point at which the statute is aimed.

"The condition upon which the statutory liability depends was declared to be 'that the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages,' etc.

"This language is accurate if the act was intended to apply to the case of a party who, having a good cause of action for a personal injury, was prevented by the death which resulted from such injury from pursuing his legal remedies, or who omitted in his lifetime to do so. It precisely fits such a case, but it is singularly inappropriate to the case of one who has, in his lifetime, maintained the action and actually recovered his damages. The form of expression employed in the act shows that the Legislature had in mind the case of a party entitled to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action and recovered his damages. This still more strongly appears by reference to the words of the act, which describe the wrongdoer against whom a right of action is given. He is not described by any language which is applicable to a party against whom judgment has been obtained by the deceased for the injury, but as 'the person who would have been liable if death had not ensued.' And (555) the enactment is that his person shall be liable, notwithstanding the death. It seems to me very evident that the only defense of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured, and that it is, to say the least, assumed throughout the act that at the time of such death the defendant was liable. In the present case the defendant does not answer the description of 'the person who would have been liable if death had not ensued.' It would not have been liable if the injured party were living, for the for-

mer judgment would be a complete bar. The statute may well be construed as meaning that the party who at the time of the bringing of the action 'would have been liable if death had not ensued' shall be liable to an action notwithstanding the death, etc."

These views of the learned judge, arising chiefly from the language of the statute, derive strong support from the suggestion that, although the statute may be considered in some respects as creating a new right of action, it has its foundation in a single wrong, and it is not likely that the Legislature would intend to subject the wrongdoer to additional liability when he has made compensation to the injured party in his lifetime in full adjustment of the wrong done him. And further to hold that, notwithstanding such adjustment, the offender might, at some time in near or distant future, be subjected to an additional claim for damages on the death of the party injured would be to impose upon such a claim an undue and prejudicial restriction and would oftentimes prevent the injured party in his lifetime from realizing in his sore need a satisfactory and present compensation. A wrongdoer would be little inclined and hardly justified in offering adequate adjustment with such a possibility hanging over him.

We were referred by counsel to *Causey v. R. R.*, 166 N. C., 5, as being in contravention of our present ruling, but we do not so interpret the decision. In that case the question presented was whether the statute of limitations commenced to run from the time of the injury or from the death of the injured party, and the Court, in adopting the latter period, held that the statute, in that respect, must be considered as conferring a new right of action, and the statute of limitations, in cases of this character, dealing only with the remedy, the statute would only commence to run from the time when, by the terms of the statute, the right of action arose, to wit, the death.

True, in support of this position, it was said that the words of this act conferring the right in cases "where, if the injured party had lived, he could maintain an action for damages," were only descriptive of the class of actions to which the statute referred, and did not operate to constitute it a survival of the old action. While this is certainly true on the facts there presented and in so far as the statute of limitations is concerned, it was by no means held, nor was it intended to hold, that this was all the significance that the language should receive (556) in the further interpretation of the statute; nor was it decided in that case, or intended to be, that the statutory action, having for its basis one and the same wrong, was to be regarded as so entirely separate and distinct that an additional recovery could be had, notwithstanding that all claim for damages therefor had been fully adjusted in the lifetime of the injured party. And in *Bolick v. R. R.*, 138 N. C., 370, to which we

were also referred, the only question decided was that the statutory action did not accrue till the death of the injured party, and could not, therefore, be incorporated by amendment with an action which had been instituted by the deceased in his lifetime.

It will be noted, in *Bolick's case,* that no compensation for the wrong had been received by the deceased, and, therefore, a cause of action existed in him at the time of his death, thus bringing the case under the exact language of the statute, and while the statutory right could not be pursued in the original action, the present *Chief Justice,* delivering the opinion, said: "Where death occurs pending an action for personal injuries, the *cause* is *merged* in the action for the death, and the only remedy is that given by section 1498 of The Code, now Revisal, sec. 59"; thus recognizing that to come within the language of the statute there must have been a cause of action existent at the time of his death. See notes in A. and E. Anno. Cases to recent case of *R. R. v. Goode,* 42 Okla. at p. 1152, and same volume, *Md. v. R. R.,* 121 Md., 457.

There is no error in the judgment, and the same must be

Affirmed.

CLARK, C. J., dissenting: As said in *Bolick v. R. R.,* 138 N. C., 370, "A cause for damages by wrongful death cannot accrue until the death," and it was held that, therefore, it could not be set up by amendment to an action which had been instituted by the deceased himself for injuries which subsequently resulted in his death. It would surely follow from this that they are, so to speak, independent causes of action, and that a recovery for or the compromise of a cause of action for personal injuries by the deceased could not possibly bar an action for his wrongful death, which could only accrue subsequent thereto by his death.

Whatever may be the opinion of the individual members of this Court whether a cause of action should be maintainable for wrongful death, this is not a matter for the courts, but for legislation. Formerly such cause of action could not be maintained. The Legislature has now provided that such cause of action can be asserted. In this case there has been a death, and the complaint alleges that it was caused by the negligence of the defendant. No one can recover for such cause of action except the administrator or executor of the deceased.
(557) *Killian v. R. R.,* 128 N. C., 261, where the history of this legislation is given. It is now asserted, in this case, by the personal representative for the first time. It has not been paid, and it has not been compromised, and it did not exist until the death of his intestate, who could not, and, indeed, did not attempt to, settle for such wrongful death.

It is true that in this action there should not be allowed any recovery for the physical pain and injury suffered by the intestate, which is usually an element in the damages recoverable for wrongful death, as this element has already been paid for. But the damages sustained by the wrongful death were given by the statute, and accrued subsequent to the recovery of the judgment by the intestate for his physical injuries, and the statute does not contemplate that payment for injuries and physical sufferings to the plaintiff's intestate should bar the family of the decedent from recovering for their loss of the value of his services to them. This is a subsequent and greater damage, and accrues to a different party.

It is true that the Legislature might amend the statute to so provide. But it is very doubtful, considering the object of the statute, which is principally to provide for the dependent family of the decedent, that the Legislature would so enact. Certainly it has not so enacted, and there is nothing in the wording of the statute which intimates to the Court that the General Assembly so intended.

In *Bolick v. R. R.*, 138 N. C., 373, it is said: "It is no defense to an action to recover for the wrongful death of the intestate that he had in his lifetime recovered a judgment against the same defendant for personal injuries which resulted in his death." The opinion in this case added: "We think this was correctly held, for there the death was a cause of action accruing subsequent to the judgment."

In *Whitehurst v. R. R.*, 160 N. C., 2, the Court, citing *Bolick v. R. R., supra*, held that where the plaintiff's intestate began an action for personal injuries and died before its termination his personal representative could bring an action for the wrongful death.

In *Broadnax v. Broadnax*, 160 N. C., 432, it was held, again citing *Bolick v. R. R., supra*, that the amount of damages recovered for a wrongful death is not liable to be applied in payment of debts and legacies, and that such cause of action did not exist until the statutes therein recited, beginning with chapter 39, Laws 1854-55, and succeeding statutes, which are now Revisal, 59 and 60. It follows inevitably that, as the action can only be brought by the personal representative, the decedent could not recover or compromise for such cause of action if he had attempted to do so, which he did not, in this case.

In *Watts v. Vanderbilt*, 167 N. C., 567, it was held, citing *Bolick v. R. R.*, that actions for injuries to the person do not survive. It was for these injuries that the intestate recovered. It is certainly based upon authority and reason, and settled by the above deci- (558) sions, that the cause of action for which the deceased recovered judgment is an entirely separate and distinct cause of action from that for wrongful death, for which this action is brought. The cause of ac-

tion for personal injuries would have abated at the death of the decedent. The cause of action for wrongful death did not accrue till the death, and is created by the statute and in favor of a different party. A recovery, or a compromise, for the former, being an entirely separate and distinct matter both in law and fact and in a different right, such judgment or compromise cannot bar a recovery by the plaintiff for this entirely separate and distinct action for wrongful death.

This case depends upon the construction of our own statute, but the conclusion reached in this dissent is sustained by many decisions upon similar statutes elsewhere. *Sturges v. Sturges,* 126 Ky., 12 L. R. A. (N. S.), 1014; *Chesapeake v. Dixon,* 179 U. S., 131; *Donahue v. Drexler,* 82 Ky., 157, 56 Am. Rep., 886; *Meyer v. Coll,* 19 Ky., 480.

In *Donahue v. Drexler,* 82 Ky., 157, 56 Am. Rep., 886, it was held that a settlement by the decedent in his lifetime for injuries occasioned by assault and battery was no bar to an action by his widow for damages on account of his death caused thereby—the latter action being maintainable under the laws of that State.

In 8 Ruling Case Law, 732, it is said: "Authorities are not wanting which take the view that under the survival act and the death act two separate and distinct causes of action are created which may coexist, but have no connection, and that these two actions may be prosecuted concurrently. *Davis v. R. R.,* 53 Ark., 117; *Gas Co. v. Orr,* 59 Ark., 215; *Telephone Co. v. Cassin,* 111 Ga., 575; *Stewart v. Electric Co.,* 104 Md., 332, 8 L. R. A. (N. S.), 384; *Bownes v. Beston,* 165 Mass., 344; *Brown v. R. R.,* 106 Wis., 137. The two actions, though prosecuted (under those statutes) by the same personal representative, are not in the same right, and hence a recovery and satisfaction is not a bar to recovery in the other. *R. R. v. Van Alstine,* 77 Ohio St., 395. These decisions proceed on the ground that a statute similar to Lord Campbell's Act creates a new cause of action, while the survival statute merely saves to the personal representative of the deceased an action which he could have brought in his lifetime for injuries arising from negligence and default, and that it must necessarily follow that neither action is an alternative or substitute for the other, and, consequently, that both may be maintained. *Stewart v. Electric Co.,* 104 Md., 332, 8 L. R. A. (N. S.), 384; *Causey v. R. R.,* 166 N. C., 5.

Any injustice to the defendant, it was held, could be prevented by the trial judge limiting the recovery in the survival action for personal injuries to the loss occasioned to the deceased prior to his death, and, in the action for the wrongful death, to the pecuniary loss sustained by
(559) the beneficiaries under such act. *Stewart v. Electric Co., supra; Brown v. R. R., supra.* In *Buck v. R. R.,* 125 Cal., 367, it is said: "Under our statutes the injured person might survive long enough to sue

and recover damages or settle with the wrongdoer, and then by his death a new cause of action would accrue to his heirs."

In *Brown v. Electric Co.*, 70 Am. St., 684, it was held: "If a statute makes the killing of a passenger by a railroad corporation through gross negligence punishable by a penalty payable to the widow and children or next of kin, such passenger cannot release the corporation from liability, and, therefore, his agreement to do so cannot bar an action for his death brought by an administrator for the benefit of the persons entitled to the penalty. In the same case it is said: "It is an action for damages arising from the mere fact of death—not damages to the deceased, but damages to his successors under the statute. Therefore, we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons. It would be necessary, to support such a conclusion, that we admit that a person has a right of action for his own death. A greater degree of absurdity would not be attained in the enactment of a statute making suicide punishable as murder in the first degree."

Upon the authorities and, it would seem, upon the logic and the letter of the statute the plaintiff's right of action in this case is an entirely separate and distinct cause of action from that for which his intestate recovered, and is not barred by the judgment recovered by such intestate for the personal injuries sustained, which later resulted in his death and the creation thereby of the cause of action in favor of his personal representative for the benefit of those entitled to share in the distribution of his personal property. Revisal, 59. This recovery, it is expressly stated, shall be "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." Revisal, 60. These could not possibly have accrued to the intestate or have been estimated in his favor.

Cited: Chambers v. R. R., 172 N. C. 560 (2d); *Chambers v. R. R.*, 172 N. C. 562, 563 (j); *Mitchell v. Talley*, 182 N. C. 686 (g).

(560)

THE NORTH CAROLINA CORPORATION COMMISSION, UPON THE COMPLAINT OF W. D. REDFERN AND OTHERS, v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 12 January, 1916.)

Corporation Commission—Appeal—Parties—Appeal and Error.

Under the statutory proceedings upon petition to the Corporation Commission to require a railroad company to relocate its depot for the alleged convenience of petitioners of a certain town, the Commission decided with the defendant company, and upon appeal to the Superior Court that court dismissed the action, upon the ground that the petitioners were not such parties as to have acquired the right, the statutes providing that the appeal be taken in the name of the State on relation of the North Carolina Corporation Commission, etc., and the present appeal being in the name of the Commissioners upon the complaint of the petitioners. In this appeal it is *Held*, that the action by the trial judge in dismissing the appeal was correct.

HOKE, J., filed concurring opinion; ALLEN, J., concurring in the result; CLARK, C. J., dissenting; WALKER, J., concurred in opinion of Justice BROWN.

APPEAL by plaintiffs from order of the Corporation Commission, heard by *Carter, J.*, Spring Term, 1915, of ANSON.

The court dismissed the appeal, and the plaintiffs appealed to this Court.

Lockhart & Dunlap for plaintiffs.

H. H. McLendon, Robinson, Caudle & Pruette for defendant.

BROWN, J. It is contended that any individual may petition the Corporation Commission to direct the removal of any railroad station in this State to some place desired by petitioner, and if the Commission refuses, petitioner may appeal to the Superior Court and have the matter submitted to the decision of a jury. The contention is based upon section 1074, Revisal, viz.: "From all decisions or determinations made by the Corporation Commission any party affected thereby shall be entitled to an appeal."

The statute distinctly confines the right of appeal to a *party* to the proceeding.

The petition sets forth no property or proprietary right in petitioners that is affected by the order of the Commission. They are affected only as citizens of the community, and have no more interest than the interveners and other citizens who oppose the removal of the station. There is no law that authorizes the individual citizen, having no interest in the subject-matter except that which is common to all, to prose-

cute before the courts in the name of the State or Corporation Commission such a proceeding as this. That right is reserved to the State, which acts for all its citizens.

This proceeding is utterly unauthorized as a legal proceeding. (561) The petition is nothing more than a complaint to the Commission, which it was its duty to investigate and, after investigation, take such action as in its judgment was proper.

In case of an appeal to the courts in such a matter as this, the only authorized parties are the State of North Carolina on relation of the Corporation Commission as plaintiff and the railroad or other corporation as defendant. The statute is plain as to who may appeal, viz., the State and the corporation whose legal rights are effected by the decision. No one else can appeal, because there are, and under the statute can be, no other parties, and the right to appeal is of course confined to parties to the proceeding. This is manifest from section 1075, which reads as follows:

"*Appeal docketed; priority of trial; burden.* The cause shall be entitled 'State of North Carolina on relation of the Corporation Commission against (here insert name of appellant),' and if there are exceptions to any facts found by the Commission, it shall be placed on the civil-issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the Commission shall be *prima facie* just and reasonable."

Section 1077 plainly indicates that the right of appeal is confined to the State and the corporation whose legal rights are affected by the Commission's order. Section 1081 also reveals what is meant by the words "any party affected thereby," for it provides, if the corporation "affected" by the order fails to obey, how obedience may be enforced.

There is no decision of this Court contrary to this view. Those cited were appeals by the corporation defendant, whose rights were affected by the Commission's order, and the only parties to the proceeding were the State and the resisting corporation.

That these so-called petitioners are not parties to this proceeding, and have no right to be, has been expressly decided by this Court in *State ex rel. Corporation Commission v. Southern Railway,* 151 N. C., 447. That case is on all-fours with this. B. F. Davis and others filed their complaint with the Corporation Commission, asking the removal of the depot of the Southern Railway at Morganton. The Commission visited Morganton and examined into the matter and ordered the removal of the depot. The railroad company appealed. This Court said: "The motion to dismiss was improperly allowed, as the law required no notice

to be served on B. F. Davis, president of the Merchants' Association, as he was no party to the proceeding. It is not claimed that said association is a legal entity; but if it was, it is no party to a proceeding of this
(562) kind. The statute provides that when an appeal is taken from an order of this nature, made by the Corporation Commission, the State shall be the plaintiff, and that the cause shall be docketed, 'State of North Carolina on relation of the Corporation Commission v. the appellant.'"

In the case before us the Commission, after making a personal inspection of the present site and other sites proposed by the petitioners, and after hearing the evidence, found the following facts:

"The present depot at Ansonville is about 1 mile from town, at a point where the line comes to grade. The site insisted upon by the citizens petitioning the removal is near the center of the town and the site originally selected by the railroad company for its depot at Ansonville, but later it was decided to reduce the grade of the road, and in reducing the grade it was necessary to make a cut at this point through the hill, ranging from 5 feet to 12 feet in depth. The approach to the depot at this point would be down grade and into the cut, and there being a curve in the railroad approaching from the north, it would, in the opinion of the Commission, create a dangerous situation. The present site is the nearest point to the town that a *suitable* place could be found for the location of a depot."

After finding these facts, the Commission made further observations as follows:

"The railroad company procured the land at the point where it sought to have the depot established, and it is in evidence that they would have built on it if it had been practicable to do so; but after the grade was reduced, finding that it was not suitable, they abandoned it. Since the present depot has been established, practically all of the building has been done in the direction of the depot, and quite a number of buildings, stores, etc., have been erected adjacent to it, and it would be an injustice to these people to move the depot, even if a suitable place was offered."

From this decision the State of North Carolina has not appealed and is not a party to the proceeding, and the defendant railroad company has not appealed. These petitioners, Redfern and others, have no right to represent the State. That duty is intrusted to the State officers, in this case the Corporation Commission. Therefore, the State, although under the statute an absolutely necessary party, has not been made a party and has not appealed. The complainants, Redfern and others, are not proper parties under the statute, have no *locus standi* in this pro-

ceeding and no right to prosecute it, and, therefore, have no right of appeal.

That this is true is manifest from an examination of the legislation creating and governing the Corporation Commission and from the character of the duties it is charged with, as well as the powers conferred upon it.

The Commission is not a judicial court, but an administrative (563) agency of the State, possessing certain *quasi* judicial and legislative powers. *State ex rel. Corporation Commission v. Southern Railway, supra.* It is the agency through which the State undertakes to regulate and control the various corporations doing business within its jurisdiction. The Commission makes freight and passenger rates, rules in regard to baggage, regulates demurrage on cars and storage charges, as well as to establish and locate railroad stations and to require a change of any station, etc. In addition to the multiplied subjects of railroad regulation, it is given general power to control and supervise electric power, light and gas companies, and is clothed with power to fix, establish, and regulate the rates and charges of such persons, companies, or corporations.

The statute contemplates that any person may lay his complaint or grievance before the Commission. It then becomes its duty to investigate the complaint, and, if it is well founded, the Commission will, upon notice, make such order as will correct it, and institute in the name of the State such legal proceedings as will enforce its order. The statute does not contemplate that every complainant may appeal and litigate the matter before the courts in his own name. It must be done in the name of the State upon the relation of the Commission. If every individual complainant is allowed to appeal and bring his grievance before a jury, it would defeat the very purpose for which a Commission was created.

Instead of having a system of rates for the entire State, the rates in each locality would be fixed by the verdict of a jury. Farmers interested in the reduction of rates between certain points on farm products would originate a proceeding before the Commission, and from an adverse decision would bring the subject for determination back to the vicinage, there to be determined by a jury of the same. Persons desiring additional facilities and conveniences within the entire range and scope of railroad operations would resort to the same forum, and the result of it would be that the Commission, the courts, and the railroads would be engulfed in a maze of controversies destructive to the public welfare and ruinous not only to the transportation systems of the State, but to the peace and prosperity of the people.

One of the powers conferred upon the Corporation Commission exclusively is "to require the erection of depot accommodations, and also to require a change in the location of any station. Revisal, 1097, subsecs. 1 and 2. This power is recognized by this Court in *Dewey v. R. R.*, 142 N. C., 403, wherein *Mr. Justice Hoke* says: "But however this may be, the Corporation Commission, the body *authorized and required by law to determine* the matter, after full and due inquiry, have fixed upon this as the proper site." Those words are peculiarly applicable to this case. This method of exerting the power of the State to compel rail-
(564) roads to establish and change their depots is the only feasible and effective method.

It is utterly impracticable to do it through the instrumentalities of courts and juries. Such a matter is foreign to the purposes for which courts were established.

It is contended that section 6 of Laws of 1907, ch. 469, gives the right of appeal to complainants. That section reads as follows: "All persons and corporations affected by this act shall have the same right of appeal from the action of the Corporation Commission under the powers contained in this act as are now provided by law."

This proceeding is not instituted under that statute, for there is nothing in it relative to establishing or changing railroad stations. Nor is it amendatory of the sections of the Revisal that confer such power. The act of 1907 connects the words "persons and corporations" together because the jurisdiction of the Commission extended to persons as well as corporations.

In certain instances persons may be hailed before the Commission and compelled to obey its decrees. In such cases they are defendants or respondents, and may appeal as well as corporations; and that is what section 6 really means. It is limited to persons and corporations affected by that act of 1907, and does not change the sections of the Revisal regulating the right and method of appeal.

This act confers upon the Commission the power to require railroads to operate additional trains when in their judgment necessary. It will scarcely be contended that under this statute any person can petition the Commission to order additional trains, and, upon their refusal, such person can appeal to the courts and have the matter submitted to a jury. If that could be done, then the same rule would apply to baggage regulations, freight and passenger rates, and to all matters intrusted to the management and control of the Commission. This would completely destroy all uniformity in the system which the State through its Legislature has devised for the control and management of public-service corporations.

There are cases where individuals can apply to the Commission for relief where their personal and property rights are involved, such as overcharges, personal discriminations, and the like. But where the matter is one which does not affect the property or legal rights of one person, but affects a community or locality, or the public generally, the Legislature does not permit any individual person to litigate the matter before the courts, but provides that the State only may do so.

That is the reason the statute expressly provides that the appeal shall be docketed in the name of the State of North Carolina, and the State will protect before the courts the rights and interests of its (565) citizens generally.

This appeal is not docketed in the name of the State, because that can be done only upon the relation of the Corporation Commission. As it is docketed, "The Corporation Commission, upon complaint of Redfern and others," the Corporation Commission is made the plaintiff appellant. Thus we have the solecism of the Commission appealing from its own decision rendered in favor of this defendant.

Affirmed.

WALKER, J., concurs.

ALLEN, J., concurs in result.

HOKE, J., concurring in the result: Under the broad provisions of the statutes applicable, I am inclined to the opinion that any one who has formally appeared before the Corporation Commission, been so recognized as party to the proceedings, and who has an interest in the questions involved, direct or indirect, may usually appeal from a decision of said Commission adversely affecting such interest; but I concur in the disposition made of the present appeal on the ground that a careful perusal of this record fails to disclose a case in which an appeal should be entertained.

The Corporation Commission has been created and organized chiefly as an administrative agency of the State and charged, among other important duties, with that of looking after and imposing such reasonable rules and regulations on the public-service corporations of the State as may be promotive of the public interests, and their action should not be disturbed unless it is made to appear that, in a given case, it is clearly unreasonable and unjust. The statute, Revisal, sec. 1075, in express terms, provides that, on appeal, "decisions or determinations of the Commission shall be *prima facie* just and reasonable."

In the case on appeal there is no allegation or suggestion that the relevant facts have not all been disclosed, and, on careful consideration

of these facts, we find nothing which shows or that would uphold the conclusion that the action of the Commission in the present instance was either unreasonable or unjust. On the contrary, it appears that they had fully and impartially considered the case, that the decision made by them rests on good and sufficient reason, and, in a cause of this character, that there is no issue of fact or law presented that would require or permit further investigation.

In *Cherry v. Canal Co.*, 140 N. C., pp. 422 and 426, the Court quotes with approval from 2 Am. Pl. and Pr., pp. 499 and 500, as follows: "In 2 A. and E. Enc. Pl. and Pr., 499, we find it stated that 'appellate courts deal with judicial acts, and it would not avail to reverse a ruling or judgment correct on the record, though it may be founded on an (566) erroneous reason.' And again, in the same volume, at page 500: 'This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other objections which the record shows could not have prejudiced the appellant's rights. The decided cases in this and other jurisdictions support this position. In *Butts v. Screws*, 95 N. C., 215, *Ashe, J.*, for the Court, says: "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." The position has been many times approved in this State, and its proper application to the facts of the present record requires that the judgment of his Honor, dismissing the appeal, should be affirmed.

It may be that he gave a wrong reason for it, but we are dealing here with results, and, in my opinion, on the facts presented, the judgment dismissing the appeal should be affirmed.

CLARK, C. J., dissenting: The Corporation Commission is an administrative and judicial body, the latter functions being conferred by virtue of the Constitution, Art. IV, sec. 12, which provides that "The General Assembly shall have no power to deprive the Judicial Department of power or jurisdiction which rightfully pertains to it as a co-ordinate department of the Government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law, in such manner as they may deem best; *provide also a proper system of appeals;* and regulate by law when necessary the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

In accordance with this provision the General Assembly has created courts subordinate to the Supreme Court, some with exclusive criminal

jurisdiction in limited areas; others with criminal and civil jurisdiction; and for the redress of complaints against common carriers, whose regulation is now entirely and fully recognized to be a part of the State Government, it has created the Corporation Commission. It has empowered this body to pass upon all complaints as to the regulation of railroads. Recognizing that a body of three men in a subordinate court came within the power prescribed in Art. IV, sec. 12, of the Constitution, the General Assembly provided for a system of appeals as follows:

"Rev., 1074. *Right of; how taken.* From *all decisions or determinations* made by the Corporation Commission *any party affected thereby* shall be entitled to an appeal."

This section further provides that where the exception is to a ruling of law the appeal shall be to the judge at chambers, and if to a finding of fact, to the Superior Court at term. Revisal, ch. 20, provides (567) for the jurisdiction given to the Corporation Commission and in section 1097 (2) authorizes the Commission "to require a change of any station or the repairing, addition to, or change of any station-house, by any railroad or other transportation company in order to promote the security, convenience, and the accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary." Revisal, 1054, provides that the Corporation Commission "shall be a *court of record,* known as the Corporation Commission. Such court shall adopt a seal and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this chapter." One of the subjects embraced, as above stated, is the power to change the location of a railroad station.

The Constitution authorized the General Assembly to establish courts subordinate to the Supreme Court and prescribe the jurisdiction. It created the Corporation Commission and gave it jurisdiction in the particulars specified, and provided that "either party affected could appeal," and that such appeal should lie from "all decisions or determinations made by the Corporation Commission." Certainly the Corporation Commission could not appeal from its own decisions, and if "either party" can appeal, such appeal is not restricted to the defendant corporation.

To remove all doubts as to the scope of the powers conferred upon the Corporation Commission and who may appeal, Laws 1907, ch. 469, "To extend and enlarge the powers of the Corporation Commission," provides in section 6 thereof: "All persons and corporations affected by this act shall have the same right of appeal from the action of the Corporation Commission under the powers contained in this act as are now provided by law." One of the facilities required by this act is set out in section 2 thereof: "and to require all transportation and transmission companies

to establish and maintain all such public-service facilities and conveniences as may be reasonable and just."

In accordance with the above authority, the plaintiffs W. D. Redfern, W. A. Smith, and L. L. Little and others filed their proceeding before the Corporation Commission, alleging that the defendant railroad company had established its depot 1 mile outside the town of Ansonville, an old and established center, though the defendant had acquired its rights of way through that section on the representation and agreement that its depot would be located in the said town; that as a consequence the defendant does not furnish such facilities and convenience to its patrons as are reasonable and just; that the defendant company owns a depot site within the town and that its removal to that point would be to the great convenience of its patrons and the public and furnish them with much better public-service facilities, and that it was necessary, in order to do this, that the company should provide a depot either upon
(568) that site which it now owns or upon some other suitable site in said town.

The defendant railroad company in its reply admitted that it owned a site for a depot in said town, but alleged that the cost of grading would entail a considerable expense, and that it had expressed its willingness to have the plaintiffs' complaint passed upon by the Corporation Commission, which had decided against the plaintiffs' complaint, and asked that the action be dismissed upon the ground that "an appeal does not lie by plaintiffs from an order of the Corporation Commission." The motion was allowed, and this appeal presents that as the sole question.

The defendant's answer ignores the fact that if it is an expense now to remove the station to the point in the town of Ansonville, where the defendant had bought a site in pursuance of its agreement, as the plaintiffs allege, to place a station in that town, the defendant has entailed this cost upon itself, and in matters that concern the public convenience the sole question is not the expense to the defendant, but the convenience of the public must also be considered.

In *Pate v. R. R.*, 122 N. C., 881, where the plaintiffs began a proceeding before the Corporation Commission to require the railroad company to establish a station, the Corporation Commission held that the public interests required the establishment of a station, but that it did not have the power under the act to so authorize (which defect was promptly corrected by the Legislature expressly conferring that power), and the *plaintiffs* appealed directly to the Supreme Court. In that case this Court held: "The appeal will lie in the first instance to the Superior Court, and thence the *party cast* has his appeal, if he so elect, to this Court."

In a later case, *S. v. R. R.*, 161 N. C., 270, where there was an appeal from the Corporation Commission to the Superior Court, on a petition at Rutherfordton against a railroad company in which the plaintiff asked the establishment of a depot, and in the Superior Court judgment was rendered in favor of the defendant, an appeal by the *plaintiffs* to this Court was entertained, *Brown, J.*, writing the opinion which granted the plaintiffs in that case a new trial in the Superior Court.

Revisal, 1054, makes the Corporation Commission a "court of record," and *Brown, J.*, in *Corporation Commission v. R. R.*, 151 N. C., 447, says that that body, while largely an administrative body (which is true), "possesses certain *quasi* judicial and legislative powers."

Revisal, 1068, authorizes such court of record to establish rules of practice, which it has done, and which are set out in Gregory's Supplement under section 1054. These rules prescribe for the filing of the complaint and service of notice of the proceeding "upon the opposite party."

Among the many cases sustaining the jurisdiction of the Corpo- (569) ration Commission to grant relief to parties instituting proceedings before the Commission to compel railroads and other corporations to grant proper facilities to the public are *Express Co. v. R. R.*, 111 N. C., 463; *Mayo v. Tel. Co.*, 112 N. C., 343; *R. R. Commission v. Tel. Co.*, 113 N. C., 213; *Caldwell v. Wilson*, 121 N. C., 425; *Pate v. R. R.*, 122 N. C., 877; and there are many others.

Revisal, 1074, which provides, "From all decisions or determinations made by the Corporation Commission *any party affected thereby* shall be entitled to appeal," further provides: "Before such party shall be allowed to appeal" he shall give notice of appeal and file his exceptions. Further in the same section it is said: "The party appealing" shall file his exceptions, and on exceptions to the law his appeal shall go to the judge of the Superior Court at chambers, and on exceptions to the issues of fact the case shall be sent to the Superior Court at term. In all this there is not only no hint or intimation that the appeal is limited to the railroad company, but, on the contrary, it is expressly provided that either party, whether persons or corporations, shall have the right to appeal.

It is suggested that although the statute makes the Corporation Commission a court of record and gives either party, whether persons or corporations, the right to appeal from all decisions, that it is not feasible to put these statutes into effect because a jury is incompetent to pass upon facts when the Corporation Commission has found them against the plaintiffs; but the railroad companies earnestly contend that an appeal to a jury is very appropriate when the decision is against themselves. It is suggested that if the subject of a controversy was as to a freight

rate or putting on an extra train, a jury would be entirely incompetent to find the facts under the supervision of a learned judge, but that when those facts are found by three men they are absolutely correct, unless found against the railroad company.

This, however, is a single and very simple question much easier for determination by a jury than many cases that are submitted to them. In this very matter of the change of a railroad station the point was presented in *S. v. R. R.,* 161 N. C., 270, and when the jury found against the plaintiffs this Court, as above stated, sustained their appeal and directed that a jury trial be given the *plaintiffs* in the Superior Court. In the other two supposed cases in *R. R. Connection Case,* 137 N. C., 1, the defendant railroad thought that a jury was competent to pass upon the facts on its appeal from an order requiring it to put on an extra train to make the Selma connection. The jury in that case rendered their verdict, but the Superior Court judge entered judgment denying the prayer of the plaintiffs that the connection should be made, if necessary,

(570) by putting on an extra train. On appeal to this Court that judgment was reversed and the defendant was ordered to make the connection, and, if necessary, to put on the extra train. On writ of error to the United States Supreme Court the judgment of this Court was affirmed, 206 U. S., 1. In consequence that train is running and the connection is made to this day, to the great accommodation and satisfaction of the public; and they owe it to that jury's verdict.

In the more difficult matter of fixing rates, when the Legislature of North Carolina directly, and not through its subordinate board of three men, fixed the passenger rate at 2 cents the reasonableness of that regulation was tried before a jury in Wake County. *S. v. R. R.,* 145 N. C., 495. The same point was also in litigation in the Federal court, and though it was there first referred to a referee, the issues of fact would have been eliminated from his report and found by a jury as in so many other cases has been done in other States, but that the railroad company withdrew the action on proof that they were making more money than at the old rate of 3¼ cents per mile.

If trial by jury is good and feasible for the railroads to use, as they did in the above cases, to review the decision or determination of the Corporation Commission when deciding upon a complaint to remove a station, or an order to make a railroad connection and put on an extra train if necessary, or to pass upon the reasonableness of rates, then it cannot be too cumbersome for the plaintiffs to have the jury pass upon the same matters, under the direction of the Superior Court judge, with right to appeal to this Court, when the decision of the Corporation Commission, the court of record to whom the decision is committed in the

first instance, has been against the plaintiffs instead of against the railroad company.

The right of appeal is either a right or a privilege. If it is a right, the plaintiffs cannot be deprived of it. If it is a privilege, the Constitution of this State, Art. I, sec. 7, forbade discrimination against our own citizens. It provides: "No man or set of men are entitled to exclusive or separate emoluments or *privileges* from the community." The General Assembly has not made such discrimination, but, on the contrary, has provided for an appeal to the Superior Court "from the action of the Commission" (not an appeal by the Commission from themselves) to "all *persons* or corporations." The men who made the Constitution of North Carolina and of the United States did not think that an appeal should be given to the moneyed interests, represented by great aggregations of capital, while denying to our own citizens the right of trial by jury. In the Constitution of the United States the provision was omitted, but at the instance of Mr. Jefferson it was inserted as the Eighth Amendment: "Where the value in controversy shall exceed $30, the right of trial by jury shall be preserved." The promised adoption of this and other amendments was the condition upon which ratification (571) by the necessary number of States was had to create the Union.

In *Broadnax v. Groom*, 64 N. C., 250, this Court said that we would not attempt to erect this Court into *"a despotism of five men,* which is opposed to the fundamental principles of our Government." We have reiterated this in several cases, among others, in *Supervisors v. Comrs.*, 169 N. C., 548. But to give to the Corporation Commission the absolute and irreviewable refusal of relief when demanded by the private citizen and property owner, while giving to the railroad company every opportunity for the review of any decision of the Corporation Commission against it, would be indeed to create the most perfect and irresponsible *"despotism of three men"* that could be conceived. To prevent this construction, the Legislature not only gave the right of appeal to "either party affected," Revisal, 1074, but by above cited Laws 1907, ch. 469, sec. 6, it has given the right to appeal to "all *persons* and corporations affected by the action of the Corporation Commission." The Corporation Commission certainly could not appeal from their own action, and the plaintiffs are *"persons."* They are the "party affected" by the denial of the relief they sought in a matter deeply affecting their pecuniary and their business interests.

There have been many cases known in this State where the high officials of railroads in locating stations have placed them on land privately bought for the personal benefit of said officials and have located the stations at such a distance from a near-by town as to damage the value of property therein while enhancing the value of their own property near

the new station. There is no evidence in this record of such fact in this instance. But if in a case of this kind an appeal should lie only in favor of the railroad company, and not for the citizens damaged, there would be much irremediable wrong.

Nothing could make the Corporation Commission more odious to the public than a provision that their decisions should be final and irreviewable against those seeking relief against railroad corporations while giving to the railroad itself the fullest right of appeal to the Superior Court, and then to the Supreme Court—a broad avenue of redress to a privileged class of money and a denial of all appeal to the citizens who have been injured in their property rights and to the community who have been inconvenienced by the refusal of the "public-service facilities and conveniences, as may be reasonable and just," which the statute requires shall be given them on application to the Corporation Commission, with right of appeal to either party.

Nowhere in our statutes is the right of appeal given more fully and explicitly to either party, whether persons or corporations, than it is conferred from "all decisions and determinations by the Corporation
(572) Commission" by Revisal, 1074, and the subsequent act of 1907, ch. 369, sec. 6.

The Legislature certainly meant to give our own citizens the same square deal it gave to railroad companies, without discrimination against either. If the construction denying to the citizen the right to appeal equally with the corporation does not meet with public approval, the General Assembly can doubtless yet make the language so plain that no one can misunderstand it.

The mere form of docketing is nothing more than a formality. It is like an action being brought "State on Relation of A.," or the former action, "A. B. to the Use of C. D." The real parties plaintiffs here are the petitioners whose property rights have been damaged by the location of this station, and who are entitled to have a jury pass upon the question, as in the location of the Rutherfordton station, when such jury trial was granted to the railroad company in the location of the station at Rutherfordton, *S. v. R. R.*, 161 N. C., 270, and just as a jury trial was granted to the railroad company in regard to putting on another train in the *Railroad Connection Case,* 137 N. C., 1. Certainly it was never intended by the mere form of docketing to deny the explicit right of appeal given to both parties from every determination or decision of the Commission. Even under the old complex forms of pleading at common law, while a plaintiff might have to choose another forum for his action, he never lost his right to litigate or to appeal. Our Constitution and laws do not reserve the right of appeal and the right of jury

trial to corporations and deny them to the citizen in controversies between them. Hence, "this protest, which is also prophecy."

Cited: Walls v. Strickland, 174 N. C. 301 (j); *In re Utilities Co.,* 179 N. C. 166 (d); *Corporation Com. v. R. R.,* 185 N. C. 456 (g); *McInnish v. Board of Education,* 187 N. C. 496 (g); *Corporation Com. v. R. R.,* 196 N. C. 193 (g); *Corporation Com. v. R. R.,* 197 N. C. 703 (g); *Utilities Com. v. Kinston,* 221 N. C. 361, 362 (f); *Utilities Com. v. Trucking Co.,* 223 N. C. 689 (g); *Utilities Com. v. Coach Co.,* 224 N. C. 394, 765 (g); *Utilities Com. v. Coach Co.,* 224 N. C. 396 (j).

D. W. HARDEE v. CITY OF HENDERSON.

(Filed 12 January, 1916.)

1. Elections—Municipal Corporations—Bond Issues—Registration—Statutes.

Where the charter of a city or town provides that for the issuance of bonds an election shall be held "under the rules and regulations presented by law for regular elections," it refers to Revisal, sec. 4323, requiring that the books of registration shall be kept open for twenty days; and construing this section in connection with section 2949, it is *Held,* that the former is for the purpose of a new and original registration, and the latter, in providing for only seven days, is for the purpose of revising the registration books so that electors may be registered whose names are not on the former books.

2. Same—Appeal and Error—Records—Supreme Court—Findings of Fact.

Where it is required for an election for the purpose of issuing municipal bonds that the books of registration shall be kept open for twenty days (Revisal, sec. 4323), but they had been kept open for only seven days (Revisal, sec. 2952); and it appears to the Supreme Court from the record on appeal, though the trial judge has not found the facts, that no elector had lost his vote, but all were registered who desired to be; that the election was fairly held, the registration was well advertised, and the time for each was appointed by law and the order of the commissioners was well known, and the right to register was available to all; that the failure of any to register was not due to the shortness of the time the books were kept open; and that the proposed issuance of bonds was generally acquiesced in by the people without organized opposition, it is *Held,* that this Court will so find the facts to be, and uphold the validity of the bonds.

APPEAL by plaintiffs from *Peebles, J.,* at chambers in Vance. (573)

Civil action, upon a motion for an injunction. Plaintiffs appealed.

B. H. Perry for plaintiff.
Thomas M. Pittman for defendant.

WALKER, J. The action was brought to enjoin the defendant from issuing or selling any of the bonds to pay for street improvement, its floating indebtedness, and for sewerage purposes, amounting in all to $50,000. An election was held, at which the question of issuing the bonds was submitted to the people and the requisite majority voted in favor of issuing them. There was no irregularity in regard to the election, unless the books of registration were not kept open long enough. Plaintiff contends that they should have been kept open twenty days, under Revisal, sec. 4323, as is provided for general elections in the State. This contention is based upon the ground that the charter of the city of Henderson requires that a special election shall be held "under the rules and regulations prescribed by law for regular elections," and that the words in the quoted passage, "regular elections," mean general elections in the State. The defendant, on the contrary, contends that these words evidently refer to regular elections held in the city under the general law relating to municipal elections (Revisal, ch. 73, secs. 2944, 2966, both inclusive), and that section 2952 of that chapter requires that the registration books shall be kept open for the registration of voters only seven days preceding the appointed day (Saturday before the election) for closing them, Sundays being excepted. Section 2944 of the Revisal, relating to municipal elections, provides that "all elections held in any city or town shall be held under the following rules and regulations," and among these "rules and regulations" will be found section 2952, providing as above set forth in regard to keeping open the books for seven days for the registration of "any new electors" whose names are not on the old and revised book; but this manifestly refers to the revision of the registration books, and not to the case of an entirely new registration, and section 2952 is to be construed with the next preceding section (2951), and when thus considered,

(574) it is clear what is meant, viz., that the shorter period would be sufficient for the registration of the comparatively few new voters, while the registration of the entire electorate might require a longer period, and, therefore, section 2949 provided that where there was such a new, original, or general registration, and not merely a revision of the old book, it should be made under the rules and regulations prescribed for the registration of voters for general elections, the words "general elections" referring not to an election purely local, but to one held throughout the State, when the books are required to be kept open for twenty days. If it was intended to refer to municipal elections, the Legislature would not have used the word "general," but the word "regular," in section 2449, the former word being chosen as having a definite

and well understood meaning and as contradistinguished from "local" or "municipal."

But while this is so, we are of the opinion that this case is governed by our recent decision in *Hill v. Skinner,* 169 N. C., 405. The two propositions settled by that case were these:

1. While the law providing for notices of election and the registration of voters is mandatory as to the officers required to give such notice, it is only directory where a fair election has been held and voters were not deprived of their right of suffrage, in which case the failure to give notice is not ground for disturbing the election where the result could not have been otherwise.

2. Though registration books which by law should have been kept open twenty days were kept open only for eight days, the election will not be set aside where there was an extremely large registration and it did not appear that any voters were deprived of their rights or that a longer period of registration would in any way have affected the result.

We attached some importance in *Hill v. Skinner* to the fact that there had been a very large actual registration of voters, but the decision did not turn on that point.

The judge did not find the facts in this case, so it devolves upon us to do so originally, or to state our conclusions of fact to such an extent as is necessary for the purpose of disposing of the appeal.

It appears, and we so find, that no elector has lost his vote by reason of the failure to strictly comply with the law as regards the time for keeping open the books, but that all were registered who deserved to be; that the election was fairly held and the people had a full and free opportunity to express their will upon the question submitted to them; that the election and the registration were well advertised, and that the time for each as appointed by law and the order of the commissioners was well known to the people, and the right to register was available to all who felt interest enough in the election to cast their vote; and, further, that the failure of any one of the voters to register was not due to the shortness of the time the books were open, but to apathy or indifference on his part; that the issue of bonds met with the gen- (575) eral acquiescence of the people, and there was no organized opposition to it. These and other facts favorable to the defendants are well supported by the verified answer and affidavits filed, and if they were set out in full, the fairness of the result of the election would more clearly appear, but we do not deem it is necessary to do so. The election was as fair and decisive of the popular will as in *Hill v. Skinner, supra,* or in any of the cases cited therein. See, especially, *Briggs sv. Raleigh,* 166 N. C., 149.

We see no error in the judge's ruling, and affirm his judgment. Affirmed.

HOKE and ALLEN, JJ., dissent.

Cited: Woodall v. Highway Com., 176 N. C. 391 (2g); *Morris v. Trustees*, 184 N. C. 636 (2g).

MARY LOU LEE ET AL. V. M. D. MCCRACKEN.

(Filed 12 January, 1916.)

Judgment—Default—Ecusable Neglect—Limitation of Actions—Statutes.

Where a judgment by default final has been taken for the want of an answer, and it appears that summons had been personally served, a verified complaint filed fully setting forth the facts entitling plaintiff to the judgment, the judgment being taken in the course and practice of the courts, is regular, and may not be set aside by motion for excusable neglect, etc., after one year from its rendition, the time limited controlling. Revisal, sec. 513.

MOTION to vacate a judgment by default final rendered in an action to set aside a deed and recover land, heard before *Cline, J.*, first at Franklin, N. C., in chambers, by consent, where his Honor made certain findings of fact relevant to inquiry, as appears of record. The cause was then continued for further consideration at May Term, 1915, Superior Court of HAYWOOD County, where the judgment in question had been rendered and docketed, when his Honor, on additional affidavits and testimony, made further findings of fact, and thereon entered judgment that the said judgment by default be set aside and defendant allowed to answer as he may be advised, and plaintiff excepted and appealed.

W. J. Hannah and J. M. Queen for plaintiff.
J. W. Ferguson and Morgan & Ward for defendant.

HOKE, J. We are unable to concur in the view of this case which was taken in the court below, and are of opinion that, on the facts as (576) found by his Honor, he was without power to vacate the judgment.

From a perusal of the findings of fact it appears that the judgment by default final was rendered and signed by *Judge Carter* at January Term, 1914, Superior Court of Haywood County, and, some fifteen months thereafter, the present motion was made and acted on at May

Term, 1915, of said court; that the action was to set aside a deed for fraud and to recover possession of a tract of land conveyed by said deed, and summons was regularly issued and personally served on defendant in Haywood County, on 9 September, 1912, and verified complaint was then filed, fully setting out the facts and describing the land, and same was cross-indexed and docketed on that date, the plaintiff seeking in this way to establish a *lis pendens* in reference to the property; that the cause was continued from time to time until November, 1913, when Mr. Crawford, who had been "spoken to by defendant" as attorney, died, and, two months thereafter, at January regular term, no answer or defense bond ever having been filed by defendant, his Honor, on perusal of the verified complaint, found the facts to be as therein stated and entered the judgment by default final as prayed for.

Our statute in reference to proceedings of this character, Revisal, sec. 513, provides that the judge may relieve a party from a judgment, etc., taken against him "through his mistake, inadvertence, surprise, or excusable neglect," at any time within one year after notice thereof, and in many decisions construing the law it has been held that where the judgment complained of is rendered on a summons personally served within the jurisdiction this one-year period shall be estimated from its rendition, the party defendant in such case being affected with notice. *Ins. Co. v. Scott; Clement v. Ireland,* 129 N. C., 220; *McLean v. McLean,* 84 N. C., 366. True, it has also been repeatedly held that this restriction as to time prevails only in case of regular judgments, that is, such as are taken according to the course and practice of the courts, and, as to irregular judgments, that this statutory period does not necessarily apply. *Calmes v. Lambert,* 153 N. C., 248; *Becton v. Dunn,* 137 N. C., 559; *Wolfe v. Davis,* 74 N. C., 597. But, to our minds, this is a regular judgment, in which it appears that the summons was personally served within the jurisdiction of the court. The verified complaint, duly filed, and the cause coming on for hearing at a regular term of the Superior Court, there being no answer filed or even a defense bond, the judge, having considered the allegations of the complaint, finds the essential facts alleged therein to be true, and enters judgment by default final according to the course and practice of the court. *Junge v. MacKnight,* 137 N. C., 285. This being true, the motion of defendant not having been made within a year, the court was without power in the premises, and the same should have been denied.

It is no answer to this position that the court, after finding that (577) the complaint had been duly and regularly filed, finds further that defendant, having employed Mr. W. T. Crawford as his attorney in the case, that his attorney applied on several occasions at the clerk's office for the complaint in order to answer, and it was not to be found there, and

that defendant was with him on one or two occasions, and perhaps applied himself for the complaint, and the clerk could not find it in his office," and the court, therefore, finds that defendant did not have an opportunity to answer the complaint. Responsibility for this condition is not fixed by the court, but, even if it was attributable to plaintiff or his counsel, the facts tending as they do to show that the complaint for a large part of the time was not in the clerk's office, where it should have been, might very well support a conclusion that the judgment was taken against defendant by surprise or excusable neglect, but they do not at all seem to show that the judgment was irregular.

The case, therefore, comes within the statutory limitation, and the motion of defendant, as stated, should have been denied.

In *Monroe v. Whitted,* 79 N. C., 508, a case to which we were referred by appellant's counsel, it appeared that no complaint was ever filed, and *Bynum, J.,* delivering the opinion, among other things, said: "We are satisfied from the evidence that no pleadings were actually filed; that the entries on the docket were made by or under the direction of the plaintiff, and that, in point of fact, no judgment was ever rendered by the knowledge or sanction of the judge presiding. It was irregular, and ought to be set aside." It thus appears that the case bears very little or no resemblance to that presented in this record.

We are confirmed in the disposition made of this appeal by other relevant facts recited in his Honor's findings, that the defendant has never filed any answer or defense bond in the cause or made any motion for time or leave to do so, and that, although his counsel, Mr. W. T. Crawford, died in November, 1913, he did not employ any other counsel; that the judgment was rendered at the regular term of Haywood Superior Court, February Term, 1914, was duly docketed, cross-indexed, and defendant did not appear at said term or make any motion in the cause from the death of his counsel, in November, 1913, until he was ousted by writ of possession issued in March, 1915.

Upon the facts it would be difficult to sustain a motion to set aside the judgment for excusable neglect or inadvertence, even if such course was now open to defendant.

There is error, and the judgment of his Honor in setting aside the former judgment is

Reversed.

Cited: Lee v. Walker, 170 N. C. 578 (f); *Jernigan v. Jernigan,* 178 N. C. 85 (b); *Bostwick v. R. R.,* 179 N. C. 488 (f); *Foster v. Allison Corp.,* 191 N. C. 173 (d); *Foster v. Allison Corp.,* 191 N. C. 175 (j); *Gillam v. Cherry,* 192 N. C. 198 (g).

(578)

MARY LOU LEE ET AL. v. J. L. WALKER.

(Filed 12 January, 1916.)

HOKE, J. In this cause, upon a similar state of facts, there was judgment at same term setting aside a judgment by default final in favor of plaintiffs against defendant J. L. Walker.

For the reasons given in the foregoing opinion in *Lee v. McCracken*, there was error in the judgment rendered setting aside the former judgment, and the same is

Reversed.

HENRY v. HILLIARD.

(Filed 12 January, 1916.)

Judicial Sales—Sales—Confirmation — Exceptions — Court's Discretion — Appeal and Error.

In this case it appearing that an estate consisting originally of a large tract of land has been administered upon for fifty years, a part of the land having been sold from time to time until it consisted of undefined mineral interests, reserved in the former conveyances, and unlocated lands, and the trustee has been ordered by the court to sell this residue, in an action within the court's jurisdiction, in which all interested were parties, to which order no exception was taken, but exception was taken to an order of the court confirming the sale, wherein it was ascertained and adjudicated that the residue had been sold at the best possible price and the findings are supported by evidence: *Held*, the order appealed from, in such instances ordinarily addressed to the discretion of the trial court, will not be disturbed.

APPEAL from an order of *Cline, J.*, entered at May Term, 1915, of HAYWOOD, confirming the report of sales of certain lands, together with the mineral interests reserved in the said lands, by parties representing the Love estate.

The action has been pending in the Superior Court of Haywood County for many years. All the owners of certain lands, known as the Love Speculation Lands, are parties to said action, and from time to time thereunder the trustee appointed in said action as such trustee and as administrator *de bonis non* with the will annexed of James R. Love, deceased, has made sales of parts of said lands under direction of the court, and distributed the proceeds to the respective owners of the interest in said lands.

Prior to the commencement of said action James R. Love had been decreed in another action to be the owner of a certain interest in said

Love Speculation Lands and to hold as trustee for the benefit of
(579) certain others, the remainder of said land. The said James R. Love died, leaving a last will and testament, therein appointing certain executors in said will, which was properly executed, probated, and recorded. Said testator provided, among other things, the following:

"And in relation to the Speculation lands, it is my will and desire that the sale shall continue under the management of my executors as though I were living, they receiving for their services the same that I am receiving, to wit, 25 per cent on the amount sold, and they are also to make titles, and Philip W. Edwards is to be continued agent as long as the executors and he can agree."

All the executors under said will died, and at January Term, 1911, of the Superior Court of Haywood County, in said action, W. J. Hannah was appointed trustee by order, which will appear in the record, with the authority to continue to make sales as therein directed. No exception was entered to said order and no appeal was taken therefrom. Thereafter the said W. J. Hannah was also appointed administrator *de bonis non* with the will annexed of the said James R. Love, and duly qualified as such.

At January Term, 1915, of the Superior Court of Haywood County an order was made in said action authorizing and directing the said W. J. Hannah, as trustee and administrator, to sell at private sale and to the best advantage any of the lands which had been located belonging to the said estate, and to execute deeds therefor; and also, in due time, to advertise in bulk the remaining unsold lands belonging to the said estate, together with all the rights, title, and interests which the Love estate had under any of its old grants and any of the lands which had not been discovered and located, including any mineral interests in the said lands belonging to the said estate which had been reserved in deeds theretofore by parties representing the Love estate. No objections nor exception was made to this order.

In obedience to this order, the said W. J. Hannah, trustee, advertised, and on 5 April, 1915, made sales at public auction of a number of tracts of land belonging to the said estate, which had heretofore been located by survey and the acreage of each tract definitely ascertained, and in addition to the sales of said tracts of land, the said W. J. Hannah on said date also sold at public auction, as directed in said order, all the unsold lands, including all the mineral belonging to the Love estate, and made report thereof to the court.

At May Term, 1915, of the Superior Court of Haywood County, his Honor, E. B. Cline, confirmed the report of the said W. J. Hannah, trustee, showing that he made sale of the unsurveyed and unlocated land belonging to the Love estate, together with the mineral interest which

had been reserved in deeds theretofore executed, the purchase price being $1,650.

In the order confirming the sales, after dealing with the sales of (580) specific tracts of land to which there is no objection, his Honor made the following findings as to the sale of the mineral interests and of the unlocated lands:

The trustee, on the ninth page of his report, reference to which is hereby made, having reported that on 5 April, 1915, he sold to Thomas Stringfield, Hugh J. Sloan, and others, all of the unsold land, including the mineral interests heretofore reserved, and the deed heretofore made, and following with a general description which will be seen by reference to said report, and the bid made at the said time by the said party having been subsequently raised by them and others until the last and final bid therefor, and tendered the court with certified checks for 20 per cent thereof, made by Hugh J. Sloan, amounting to a total of $1,650, which bid the court finds to be the best bid obtainable, and which, according to the information before the court, is a fair and reasonable bid, taking into consideration the uncertainty of the value of either the property or right of property or interest in property which the purchaser acquired therein, the court being of the opinion that this holding of interest should be sold and conveyed, in view of the fact that the estate has now been kept open for more than fifty years and gone down to a remnant where the continuance of it does not pay the expense of the trustee and surveyors and other incidental expenses; the court further finding that there are approximately three hundred heirs of the James R. Love estate who would be interested in the holding of this remnant if it remains unsold, which probably in the very nature of the case in the lapse of time will become more numerous all the while, and the court believing that its order heretofore made in regard to this property, directing the sale thereof, was for the best interest of all concerned and the best disposition of the matter which has long perplexed the court and the very numerous heirs at law and which has subjected them during the past years to great expense, which expense of the administration of the estate ought to be now terminated as speedily as possible: The court does hereby ratify, approve, and confirm the bid of the said Hugh J. Sloan for the property, rights of property and interest referred to and covered by the said ninth page of the trustee's report, beginning with the words, "In addition to the tracts of land hereinbefore specifically described, etc.," and the said W. J. Hannah, trustee, is hereby authorized and empowered and directed to execute to him and his assigns a sufficient deed conveying the said property, interest in and rights of property, upon the receipt of the full purchase money, to wit, $1,650, it being understood

that the trustee in said deed makes no representation or guarantee of the property which the grantees therein will acquire under said deed, and that he will only convey such interest as the James R. Love estate, or other owners of the Love Speculation Land of which this is a part,
(581) has or as he is authorized by law to convey in said property and rights of property.

(Signed) E. B. CLINE,
Judge Presiding.

Certain heirs at law and distributees of said estate filed in the record of this cause certain objections to the confirmation of the sales, in which certain undiscovered lands and all the reserved mineral interests in said estate were sold for the sum of $1,650. Objections overruled, and objectors except and appeal to the Supreme Court.

J. W. Ferguson and Gilmer & Gilmer for appellants.
W. J. Hannah and Morgan & Ward for appellees.

ALLEN, J. The estate which is being administered in this action has been kept open and unsettled for a period of fifty years, and the only question presented by this appeal is as to the validity of the order confirming the sale of the mineral interests reserved in deeds heretofore executed and of unlocated lands.

During the course of the administration trustees have been appointed who have actively managed the estate, and competent surveyors have been regularly employed to locate the lands.

Sales of land have been made from time to time until there remains only a remnant of mineral interests and unlocated lands, and his Honor finds that the continuance of the estate in its unsettled condition will not pay the expenses of the trustee and surveyors and other incidental expenses.

The number of persons interested in the estate is three hundred or more, all of whom are represented in the action, and only a small proportion of these object to a confirmation of the sale.

No evidence has been offered that the mineral interests sold are worth more than the price bid, and lands which remain undiscovered and unlocated after a diligent search for fifty years are likely to remain so.

Under these conditions, which are undisputed, we cannot say that his Honor exceeded his authority or that the order of confirmation is not for the best interest of all concerned.

The court had jurisdiction of the parties and of the subject-matter, and ordinarily the propriety of confirming a sale is addressed to the discretion of the judge of the Superior Courts, whose findings, when

supported by evidence, are binding upon the appellate Court (*Thompson v. Rospigliosi,* 162 N. C., 157), and we find nothing in the record which would justify a reversal of his order.

Affirmed.

(582)

WILLIAM SIDNEY DAVIS v. SOUTHERN RAILWAY COMPANY.

(Filed 12 January, 1916.)

1. Railroads—Negligence—Pedestrians—Schedules—Speed of Trains.

A person using a railroad track for a footway, whether as trespasser or licensee, does so subject to the superior right of a railway company to have the unimpeded use thereof for the operation of its trains while serving the public in transporting passengers and freight; and the railroad company is not under any legal obligation to observe the convenience of such persons in making the schedules of their trains or regulating their speed.

2. Same—Danger Implied—Presumption.

Trespassers or licensees using the track of a railroad company as a passway have, from the nature of their surroundings, at least implied knowledge of its danger, and are required to observe a proper degree of care for their own safety in doing so; and the engineer on a passing locomotive may reasonably expect that a person walking along the track in front, who is in apparent possession of his faculties, will leave the place of danger in time to avoid his own injury by being run upon or struck by the moving train.

3. Same—Passing Train—Vortex—Accidents.

The plaintiff, with a companion, both in full possession of their faculties, were walking along a railroad track paralleling that of the defendant, the plaintiff on the sills outside of the rail, the ends of which sills were 5½ feet from the ends of the sills of the defendant road. The plaintiff's companion informed him of an approaching train, but he continued on his way, and as the train passed he was injured by falling, in some way, beneath it, claiming it resulted from the vortex caused by the train: *Held,* had this been the cause, it was an accident which could not have reasonably been anticipated by the defendant's engineer, and afforded no evidence of actionable negligence.

4. Railroads—Negligence—Evidence—Sunday Laws—Movement of Trains—Proximate Cause—Commerce.

In an action to recover damages for a personal injury alleged to have been caused by the negligent running of the defendant's train, the mere fact that the train was being run on Sunday in violation of a statute of the State is no evidence of a violation by the defendant of its duty owed to plaintiff, injured while using the track as a walkway, and it also lacks the element of proximate cause necessary to sustain a verdict; and this is

especially so when the train was an interstate one and not controlled by our statute.

5. Evidence—Judicial Notice—Railroads—Grades—Speed of Train.

In an action to recover damages for a personal injury alleged to have been caused by plaintiff's having been drawn within the vortex of defendant's rapidly moving train, it appeared from the evidence that the train was a freight train of forty-six cars drawn by two locomotives, which had stopped at a water tank, about 448 feet down a heavy grade from the place of the injury, and 200 feet after starting it was going at a speed of 6 or 8 miles an hour: *Held*, the Court will take judicial knowledge that the speed of the train at the place of the injury could not have been 25 or 30 miles an hour at the time the injury was inflicted, though there was some slight evidence to the contrary.

6. Judicial Knowledge—Railroads—Vortex—Passing Trains.

The plaintiff claims that he was drawn into the vortex of defendant's rapidly passing train, which caused the injury complained of. *Held*, the Court will take judicial knowledge of the fact that the force would be centrifugal from the side of the train, and would cause him to fall outward, instead of creating a vortex which would carry him beneath the train.

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

(583) APPEAL by plaintiff from a judgment of nonsuit rendered by *Daniels, J.*, at April Term, 1915, of WAKE.

The plaintiff, on July 17, 1910, it being Sunday, was walking with a companion, Tom Jennings, on that part of defendant's right of way which lies between the city of Raleigh and Pullen's Park, which is about a mile west of defendant's station at Raleigh. There are two tracks laid on said right of way from Raleigh to Cary, about 8 miles distant, which tracks are parallel to each other, with 8 feet of space between the inside rails of each track, or those nearest to each other, the rails being about 1½ feet from the ends of the cross-ties on the same side, leaving a space of about 5 or 5½ feet between the ends of the cross-ties of the two railways. Plaintiff and Jennings were walking towards Pullen Park, in a westwardly direction, about 11 o'clock Sunday morning, Jennings between the rails of the Seaboard Air Line Railway track, which was laid on said right of way parallel with defendant's track, as above stated, and plaintiff on the ends of the cross-ties next to defendant's track. Jennings heard a distant freight train coming on the defendant's track from the direction of Raleigh and going west. It was an interstate train, hauling cars through this State from Pinner's Point, Va., to Birmingham, Ala., and other cities in the south and west. There were forty-six cars in the train, of which forty-five were loaded with interstate freight, and at the time of the accident the train was

proceeding from Selma, N. C., to Greensboro, having just before stopped at the Raleigh tank for water. The grade from the tank to Pullen's Park was a heavy one. The estimates of the speed of the train, at the time plaintiff was injured, were conflicting, some witnesses testifying that it was as low as from 3 to 6 miles and others that it was as much as 25 to 30 miles. The train was drawn by two engines, called a double-header. When Jennings heard and saw the train coming in the same direction they were going, he warned the plaintiff by telling him to look out for it, the train being some distance from them when he first heard it. He stated that he thought they were a safe distance from the oncoming train. Sidney Davis testified that when he looked back the two engines were abreast of them and shortly afterwards he was drawn under one of the cars by the suction which was caused by the speed of the train, and his leg mashed. There was some very strong and disinterested testimony for the defendant that the (584) train was running slowly, under Boylan's Bridge, up the heavy grade, and that no suction could have been produced, and other evidence that even at a greater rate of speed than 30 miles an hour trains had frequently passed close to section hands, who were repairing the tracks, without any such effect being produced; also that the effect produced by a rapidly moving train would be merely to split the air and drive objects away from it, such as dust from the track and hats from the heads of men standing near it, the force of the wind being away from the train rather than towards it.

There was a verdict for the plaintiff, which the court set aside for the reason that there was no evidence to support it, and entered a judgment of nonsuit. Plaintiff appealed.

W. H. Lyon, Jr., and Manning & Kitchin for plaintiff.

A. B. Andrews for defendant.

WALKER, J., after stating the case: The evidence must be considered in the view most favorable to the plaintiff.

This Court has held so frequently as to have made it an axiom of the law that a person using the track of a railroad company for a footway, whether as trespasser or licensee, does so subject to the undoubted and superior right of the railway company to have the unimpeded use thereof for the operation of its trains, while serving the public in transporting passengers and freight. It is bound by the law to receive passengers and freight and to carry them, by the exercise of care and diligence, to their destination, and, therefore, it is not so much the railroad company which is thus favored and preferred by the law over a trespasser and licensee walking on or dangerously near its tracks, as the

public, although the railroad company has, independently, rights and privileges with respect to its tracks and rights of way which are not permitted by the law to be abridged in order to accommodate those who for their own convenience and at their own will and pleasure use them as footways. By reference to the numerous cases upon this subject which have been decided by this Court it will be seen that it has been held positively, unequivocally, and uniformly by us that the principle which gives to the railroad company, while serving the public, this superior and exclusive right to the use of its tracks and its right of way is not in the least modified by anything having reference to the speed of the train. *McAdoo v. R. R.*, 105 N. C., 140; *High v. R. R.*, 112 N. C., 385; *Abernathy v. R. R.*, 164 N. C., 91; *Ward v. R. R.*, 167 N. C., 148, and cases therein cited, or to the fact that it was accustomed to run at a certain speed, nor because it was contrary to usage or custom to run on Sunday, if such was the fact in this case.

A railroad company is not under any legal obligation to regulate the rate of speed of its trains for the convenience of those using its
(585) right of way, for its tracks are always places of danger, and the pedestrian, who can easily step aside and avoid any danger, should do so on the approach of a train. He cannot require the company to slow up any more than to stop. He must look out for trains and take care of himself, and the engineer has the right to suppose that he has done so, or that he will do so in time to save himself. He must expect trains at all times, for he does not control the schedules of the company, and, besides, it has the right to run extra trains and to use its tracks for its purposes at any hours it chooses in the transaction of its business as a public carrier, and cannot be lawfully obstructed or impeded in the prosecution of this right or prevented from its free and full exercise in order to take care of those who go upon its property as trespassers or as licensees, who are there by sufferance only. It must not willfully or heedlessly injure them; but as they are not invited upon the right of way in any sense other than that the railroad company had not taken steps to prevent its use by them as a footpath, they are required to look out for their own safety.

Justice Avery, speaking for the Court in *High v. R. R.*, 112 N. C., 385, said: "Whether he saw the plaintiff at a distance of 150 yards or of 10 feet, he was not at fault in acting on the supposition that she would still get out of the way. It is not material whether the train was moving fast or slow in such a case as this. For present purposes the relative condition of the parties would have been the same had the engine been moving 50 miles an hour and had she been discovered on the track at a distance that would be traversed in the same time that would have been consumed in going 10 feet at the rate of 10 miles an hour, unless addi-

tional liability should have been incurred by running so fast in a populous town." And again, in the same case: "If the plaintiff had looked and listened for approaching trains as a person using a track for a footway should in the exercise of ordinary care always do, she would have seen that the train, *contrary to the usual custom,* was moving on the siding. The facts that it was a windy day and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful." He then goes on to say that as the woman was apparently is possession of her normal faculties, and her natural senses of sight and hearing, there was nothing which required the engineer to depart from the usual rule, that the servant of the company is warranted in expecting that trespassers or licensees, seemingly of sound mind and body and in possession of their senses, will leave the place of danger till it is too late for him, by stopping the train or slackening its speed, to prevent a collision, citing especially in support of these propositions, so thoroughly established in our law, the cases of *McAdoo v. R. R.,* 105 N. C., 140; *Meredith v. R. R.,* 108 N. C., 616, and *Norwood v. R. R.,* 111 N. C., 236. In other (586) words, it was held that if the mental and physical condition of the person on the track is such as to indicate that he is capable of caring for himself, the engineer is under no duty or obligation to take care of him by even slowing down his engine; and *Justice Avery,* in *High's case,* distinguishes from it those of *Deans v. R. R.,* 107 N. C., 686 (where the man was lying apparently helpless on the track); *Bullock v. R. R.,* 105 N. C., 180 (where the horse and wagon had stalled on the track and a signal given to stop), and *Clark v. R. R.,* 109 N. C., 430 (where the party was handicapped by being on a trestle); but in all cases where the person on the right of way is not helpless, or disabled in some way, the above rule applies with its full force.

In *Abernathy v. R. R.,* 164 N. C., 97 and 98, the Court, quoting, in part, from and approving *Glenn v. R. R.,* 128 N. C., 184, said: "The railroad track itself was a warning of danger, made imminent by the approaching train. It was then his duty to keep his 'wits' about him and to use them for his own safety. He knew or ought to have known that he was a trespasser, and it was his duty to have gotten out of the way of the train. The defendant was under no obligation to stop its train at the sight of a man on its track. . . . It was apparent to the engineer that the plaintiff was in full possession of his faculties and could take care of himself, and the engineer had the right to presume that he would leave the track in time to avoid the injury. 'That he did not do so was his own fault, and he should suffer the consequences of his folly.' The doctrine of the cases already cited and decided in this

Court has been firmly established in other jurisdictions, and notably in *R. R. v. Houston,* 95 U. S., 697, where it is said that a person using the track of a railroad company must look and listen, and any failure to do so will deprive him of all right to recover for any injury caused thereby." A party cannot walk carelessly and blindly into a place of danger, and hold any one but himself to blame for the resultant injury. It was also said, in that case, that the plaintiff, as here, was in full possession of his faculties and able to take care of himself, and the engineer, therefore, had the right to presume up to the last moment, when it was too late to save him, that he would leave his dangerous position in time to avoid injury to himself, and that he did not do so was his own fault, and he should suffer the consequences of his folly. *Volenti non fit injuria.*

There are so many cases to the same effect, which have been decided in this Court, that it would be useless and tedious to review them, and we will content ourselves with merely citing them, except one or two of recent date. *Parker v. R. R.,* 86 N. C., 221; *McAdoo v. R. R., supra; Meredith v. R. R., supra; Norwood v. R. R., supra; High v. R. R., supra; Syme v. R. R.,* 113 N. C., 558; *Bessent v. R. R.,* 132 N. C.,
(587) 934; *Stewart v. R. R.,* 128 N. C., 518; *Wycoff v. R. R.,* 126 N. C., 1152; *Sheldon v. Asheville,* 119 N. C., 606; *Beach v. R. R.,* 148 N. C., 153; *Lea v. R. R.,* 129 N. C., 459; *Morrow v. R. R.,* 147 N. C., 623; *Treadwell v. R. R.,* 169 N. C., 694.

The recent cases of *Abernathy v. R. R.,* 164 N. C., 91, and *Ward v. R. R.,* 167 N. C., 148, have fully affirmed all of the principles settled by the above authorities. They are specially mentioned here, and in this connection, as in both of them, it was contended by the plaintiffs therein that they were on that part of the right of way where they did not expect trains to come at the time they were injured, and that this fact varied the rule; but this Court held, contrary to that view, that such a place is always one of danger, as the company has the right to the free and unimpeded use of its tracks, at all times, for its regular or extra trains, and that outsiders must keep off, or, if they insist on using the right of way for their own purposes, they must take care of themselves. It was further said, following a court of the highest authority, that under such circumstances the right of way itself is a place of danger, as it seems necessary to repeat with emphasis, and a warning to all who would use it as a footway. In the *Ward case,* at p. 155 the Court thus referred to *Neal v. R. R.,* 126 N. C., 634: "It was there said that if a person is walking on a railroad track in open daylight, and has an unobstructed view of an approaching train, and is nevertheless run over and injured, he is guilty of such negligence as deprives him of the right to recover damages; and this is so even though an ordi-

nance of a town, as to the train's rate of speed, was being violated at the time, or the bell was not rung as required by the ordinance, or a lookout was not kept by the engineer or fireman, the injury being referred by the law to the plaintiff's own negligence as its proximate cause, citing *McAdoo's case, Syme's case, Meredith's case, Norwood's case, High's case,* all *supra.*"

Justice Hoke, in two recent cases, has clearly and forcefully stated the true doctrine: "We have held in many well considered cases that the engineer of a moving train who sees, on the track ahead, a pedestrian who is alive and in the apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection and will leave the track in time to save himself from injury." This was said by the learned justice in *Talley v. R. R.,* 163 N. C., 567, citing *Beach v. R. R.,* 148 N. C., 153, and *Exum v. R. R.,* 154 N. C., 408, and in *Hill v. R. R.,* 169 N. C., 740, and on the same day that case was decided, we again reaffirmed the principle in *Treadwell v. R. R.,* 169 N. C., 694, saying in regard to it: "It can never be assumed that trains are not coming on a track at a particular time when it is (588) being used for the convenience of trespassers or licensees, and, therefore, that there can be no risk to a pedestrian from them. In the cases above cited this Court held, as it did also in *Beach v. R. R.,* 148 N. C., 153, that a railroad track is intended for the running and operation of trains, and not for a walkway, and the company owning the track has the right, unless the statute has in some way restricted that right, to the full and unimpeded use of it. The public has rights as well as the individual, and usually and reasonably the former are considered superior to the latter. That private convenience must yield to the public good and public accommodation is an ancient maxim of the law. If we should for a moment listen with favor to the argument, and eventually establish the principle, that an engineer must stop or even slacken his speed until it may suit the convenience of a trespasser on the track to get off, the operation of railroads would be seriously retarded, if not made practically impossible, and the injury to the public would be incalculable. The prior right to the use of the track is in the railway, especially as between it and a trespasser who is apparently in possession of his senses and easily able to step off the track. He has the advantage of the company, whose train can run only on its track, and besides is using its property gratuitously for his own pleasure and convenience, and if he has implied license to do so, it must be considered as held, and the

privilege must be exercised, subject strictly to the company's right to use its tracks for running its trains."

The principles heretofore adopted and applied by us in the cases to which we have referred seem to have met with approval in all other courts, and they certainly accord with our sense of justice and fairness.

Public carriers are held to a strict accountability in the discharge of their duties of receiving and transporting freight and passengers, and heavy penalties have been imposed by statutes for failure to do so, or for delays in doing so. In order to discharge this legal obligation to the public, sometimes very onerous at the best, they are compelled to have fixed schedules for their regular trains and also to run extra trains to accommodate the public and to perform their duty, and their trains are, therefore, constantly in operation, day and night.

The track laid under the Boylan Bridge was a main track and always live, and one on which a train might pass at any time. But plaintiff also had actual notice of the train's approach, for his companion, and his own witness, warned him of it by telling him to "look out." Why tell him to do so, if there was no danger anticipated from the coming train when it passed them? And there is another very pertinent question, Why did plaintiff not hear the train as well as his companion, who was walking with him and right by him? He did not look, or he would have seen it, as it was in plain view, on a straight track in the
(589) broad daylight. He did not listen, for if he had done so he would have heard it, for his companion, Tom Jennings, both saw and heard it.

There are other considerations which lead to the conclusion that defendant is not liable to the plaintiff for this injury. The companion, Tom Jennings, testified that he was walking right by him and did not feel the force of the wind in the least. The improbability that plaintiff was sucked under the cars is by itself very great, when viewed in the light of his own testimony, and is really contrary to the physical law; but when we examine the other evidence it becomes conclusive that no such thing happened, and that he was injured by his own act.

In *L. & N. R. R. v. Lawson,* 161 Ky., 39 (170 S. W., 198), the Court held: A railroad company owed to a licensee walking near its tracks, and who knew of the approach of a train, no duty to slacken its speed of 25 or 30 miles an hour in order to prevent him from being sucked under the train, since, conceding the possibility of its occurrence, it is so remote that ordinary care does not require a railroad company to anticipate or guard against it. It was said in the opinion: "The danger of striking a trespasser is infinitely greater than the danger of injuring a licensee by suction. Trespassers are frequently killed. The number of persons actually sucked under trains, even if such cases ever occur

is so infinitesimally small it would certainly be unreasonable to require railroad companies to reduce the speed of their trains for the purpose of avoiding such accidents. If there be any danger from suction, certainly a licensee, who knows of the approach of a train and has a reasonable opportunity to do so, must get away from the track a sufficient distance to avoid being injured in that way. In our opinion, the trial court erred in not directing a verdict in favor of defendant." The same principle was declared in *Graney v. St. L. I. M. & S. R. R.*, 157 Mo., 666 (57 S. W., 276).

This Court, in *Markham v. R. R.*, 119 N. C., 715, held: An engineer seeing a person walking on or near the railroad track, and having no reason to know or believe that he is disabled in any way from seeing, hearing, and understanding the situation, is allowed to presume that the person is sane and prudent and will either remain upon the side-track, where he is safe, or will leave the roadbed proper upon the approach of the train. And we held in Matthews *v. R. R.*, 117 N. C., 640, that an engineer approaching a person who is walking on a footpath near the end of the cross-ties in the same direction as the train is moving has the right to assume that he will remain where he is, if a safe place, or will step farther away from the track if it is dangerous, and that the latter's own want of care must be considered the legal cause of his injury. And in *Royster v. R. R.*, 147 N. C., 347, 350, it was held that the rapid speed of the train, even if an unusual one, can make no difference, if the injured party knew, or could by looking and listening or otherwise by the exercise of due care on his part have known (590) that the train was coming toward him, citing *Pepper v. R. R.*, 105 Cal., 389; *Kelly v. R. R.*, 78 Mo., 138; and to the same effect are *Meredith v. R. R., supra,* and *Norwood v. R. R., supra,* which held that the trespasser or licensee must keep a sharp lookout for his own protection, and if he fails to do so, and is hurt, the fault is all his.

The cases cited by the plaintiff will be found, on examination, to be quite distinguishable from this case, as the facts were radically different, and they were decided upon the application of a principle altogether different. It may be remarked, though, that the cases generally agree that suction does not, at least usually, occur at the sides of the train, but only at the rear, and for obvious reasons.

That the train was running on Sunday makes no difference, even if it was violating the local law in that respect. The Court said in *P. W. S. R. R. Co. v. P. and H. Towboat Co.*, 23 Howard (64 U. S.), 209, 218: "The law relating to the observance of Sunday defines a duty of a citizen to the State, and to the State only. For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty

the loss of a ship by the tortious conduct of another, against whom the owner has committed no offense. It is true that in England, after the statute 29 Ch. II., forbidding labor on the Lord's day, they have, by a course of decisions perhaps too obsequiously followed in this country, undertaken to add to the penalty by declaring void contracts made on that day; but this was only in case of executory contracts which the courts were invoked to execute. It is also true that cases may be found in the State of Massachusetts (see 10 Met., 363, and 4 Cush., 322) which, on a superficial view, might seem to favor this doctrine of set-off in cases of tort. But those decisions depend on the peculiar legislation and customs of that State more than on any general principles of justice or law. See the case of *Woodman v. Hubbard,* 5 Fost., 67. We would refer, also, to a case very similar in its circumstances to the present, in the Supreme Court of Pennsylvania, in which this subject is very fully examined by the learned *Chief Justice* of that Court; and we concur in his conclusion: 'We should work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he, too, is a public offender. See *Mohney v. Cook,* 26 Pa., 342.' We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of $7,000 on the libellants, by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for breach of the statute."

(591) Another reason why the fact of its being Sunday should have no effect on the result is that it was not the proximate cause of the injury, which might just as well have followed if it had been on a Monday.

The case is to be decided, not by the sacredness of the day on which the accident occurred, but by the management of the train and the conduct of the plaintiff; and to this may be added the fact, which constitutes a third reason, that it was an interstate train not subject to the local statute. As was observed by Mr. Webster in the argument of *Gibbons v. Ogden,* 9 Wheaton, 17: "The State may legislate, it is said, whenever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? It has done all that it deemed wise; and are the States to do whatever Congress has left undone? Congress makes such rules as in its judgment the case requires, and those rules, whatever they are, constitute the system. All useful regulations do not consist in restraint; and that which Congress sees fit to leave free is a part of the regulation as much as the rest." The same view was adopted in *Re Rahrer,* 140 U. S., 545, where the Court said: "The power of Congress

to regulate commerce among the several States when the subjects of that power are national in their nature is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States." However it may formerly have been, Congress has recently so fully occupied the entire field of interstate commerce as to forbid any action by the State which tends to regulate, control, or restrict it. It was held in *Leisy v. Hardon,* 135 U. S., 100, that commerce between the States has been confided exclusively to Congress by the Federal Constitution, and is not within the influence or control of the State, in the exercise of its police power, unless made so by congressional action. Where Congress is silent or has merely failed to act upon any special subject, it is equivalent to a declaration on its part that in the particular case commerce shall be free and untrammelled. *Bridge Co. v. Kentucky,* 154 U. S., 204.

There is no question in this case as to the violation of any city ordinance in regard to the speed of trains or of any other law on that subject. The Raleigh ordinance regulating the speed of trains within the city limits was not passed until 1912, whereas the plaintiff was injured in 1910. The original theory upon which this case was brought, judging by the complaint, was that the train was running at a speed exceeding 6 miles an hour, which was the limit fixed by the city ordinance, but it turned out, contrary to this theory, that there was no such ordinance at the time of the accident. There are also other dis- (592) crepancies between the allegations and the proof.

Plaintiff testified that he could not tell how fast the train was running. The engine was standing at the tank taking water, and was 200 feet from the bridge, and the accident occurred 285 feet beyond the bridge, making 485 feet traversed by the engine before plaintiff was injured. It was a heavy grade from the tank to this place and beyond. Plaintiff's witness, Phillips, said the train was running at a speed of 6 or 8 miles as it passed under the bridge, and consisted of 2 engines and 46 cars. It would be hard to believe that such a train, proceeding up a considerable grade, and round a curve, could acquire the momentum of speed described, 25 miles per hour. Our knowledge of natural and physical laws contradicts any such claim. The train had hardly gone a distance equal to one-third of its own length before the accident occurred. But according to Phillips, it had only acquired a speed of 6 or 8 miles an hour when it passed under the bridge, a little less than half of the whole distance. "Uncontroverted evidence produced to

establish a fact does not preclude the court from finding the fact to be otherwise by resort to judicial knowledge." 16 Cyc., 850, 852, 863, 864, and 873. "We may take notice of matters and facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence." 16 Cyc., 852. *Russ v. Boston,* 157 Mass., 60. We are not bound to believe that has been done which is impossible according to the ordinary laws of nature; and this judicial notice extends to distance and speed and their relation to each other (16 Cyc., 863, 873), where the question is so presented as to require but the exercise of a little common sense, which even judges are supposed to possess, to determine how the fact is.

It must be remembered, too, that Jennings said that he did not feel any force of the wind as the train passed by them, and he was almost touching the plaintiff as they walked along the Seaboard track together, and plaintiff said the force of the wind pushed him out, not in, and knocked him down; he scrambled to get away, and his leg was cut off. The utter improbability that he was sucked under the cars is shown by this story when compared with the other evidence, and our common knowledge that such is not the case at that part of a train, there being nothing to create a vacuum and cause an inrush of air, so as to create suction towards the car. The force of the air would be outward—centrifugal, rather than centripetal—and this is what knocked him down, if it be true that he fell and lost his leg in that way. It is more reasonable to conclude, as did the learned judge, even against the verdict of the jury, that the plaintiff's theory was incredible and that he was doing more than merely walking quietly with Jennings along the Seaboard track, and there was strong evidence that the train was only
(593) starting and that he was trying to get on the car, or grabbing at it with other boys, sportively but recklessly.

We have dealt with the case as if the plaintiff was on the defendant's right of way; but it is stronger for the defendant, as he was on the Seaboard track, apparently out of danger, and no engineer could reasonably have foreseen the occurrence of such an accident, even if we assume that it could possibly have happened by suction.

The cases of *Graney v. R. R.,* 157 Mo., 666, and *R. R. v. Lawson,* 161 Ky., 39, which were cited to us by defendant's counsel, are precisely applicable, as they hold that if injury by suction is possible, it is so improbable as not to be in law among those events which can be foreseen, and, as matter of law, that an engineer is not required to anticipate its occurrence and slacken the speed of the train on that account. The other case cited for plaintiff, *Munroe v. R. R.,* 85 N. J. L., 688, presents facts essentially different from those shown in this record, as there the intestate was standing as a passenger on the platform in

Elizabeth, N. J., at the place for receiving and discharging passengers and where he had been invited to come and where he had the right to be, and a train from New York whizzed by him at an enormous rate of speed—a mile a minute—and the force of the current of air thus generated knocked him down on the platform and injured him, so that he died. The case is principally valuable here as tending to show that this plaintiff's theory, that he was forced under the train by the sudden rush of the wind, is unreal, or, at least, not substantiated, for the intestate of plaintiff, in that case, was not sucked under the cars, but was pushed along and fell on the platform.

It results that the nonsuit was properly entered, for several reasons:

1. That there was no evidence that defendant was guilty of any negligence which proximately caused the injury to the plaintiff.

2. If the injury occurred in the manner alleged by the plaintiff, it was such an unusual occurrence as not to be one which the engineer could reasonably have expected would be the result of the rapid movement of the train.

3. The plaintiff having equal opportunity with the engineer to see the danger, if there was any, had he exercised ordinary care, and being able to place himself in a position of safety, was himself guilty of such negligence as bars his recovery.

Our conclusion is that, for the reasons above stated, the judgment should be

Affirmed.

ALLEN, J. I concur in the opinion of sustaining the judgment of nonsuit.

An examination of the complaint makes it clear that the action was commenced upon the theory that the defendant was negligent (594) in that it had violated an ordinance of the city of Raleigh regulating the speed of trains; but this ground of negligence had to be abandoned because there was no such ordinance in existence at the time the plaintiff was injured.

The plaintiff then undertook to prove that at the time of his injury he was walking in a cut 30 feet deep, on the track of the Seaboard Railroad, about 5 feet from the track of the defendant; that this track was used generally by the public; that the rate of speed of trains passing this point was usually 10 miles an hour; that the train which injured him was running 25 or 30 miles an hour, that he relied on the custom as to the speed of the train, and as the train was passing he was carried by suction under the train and injured.

I recognize the rule that it is for the jury, and not for this Court, to pass on the weight of evidence and the credibility of witnesses, but the

two facts upon which this position rests: (1) that the train was running 25 or 30 miles an hour, (2) that the plaintiff was carried under the train by suction, are not only not established, except as they may be said to be included in the verdict, but the circumstances show they could not have existed.

The defendant's train was a freight carrying forty-six loaded cars. It was at a standstill at the water tank 485 feet from the place of the injury, and it was running partly on a curve and up a heavy grade.

One witness, a young man about 20 years of age, the companion of the plaintiff, who had not noticed the speed of the train as it was approaching, and had to reach his conclusion in a moment of time, testified that the train was running 25 or 30 miles an hour; but the circumstances as to the length and weight of the train, the curve, the grade, and the distance traversed—circumstances that are not disputed—would seem to make it impossible for the train to have attained this speed.

No witness testified that the plaintiff was carried under the train by suction.

The plaintiff testified that as the train passed "It seemed like a force of wind pushed me like that and knocked me down," and he told his brother he did not know how it happened or how he got under the train.

His companion at the time of his injury, who was walking by his side, testified that he did not feel the force of the wind as the train passed.

There was no evidence that in the history of railroading any person had been injured by the force of wind while standing 5 feet from a passing train running 25 or 30 miles an hour, and no evidence that any such injury could have been anticipated or foreseen.

It was, however, for the jury to determine the weight of the evidence,
(595) and we are confined to the single inquiry as to whether there is evidence of negligence, and this involves the question as to whether there has been a breach of duty on the part of the defendant.

I do not think that acceleration of the speed of the train, if established, is negligence, and as there is no evidence that the injury to the plaintiff could have been anticipated by the exercise of ordinary care, the judgment of nonsuit was properly entered.

This Court said in *Carter v. Lumber Co.*, 129 N. C., 209, which has been frequently approved: "No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care under all the circumstances, have foreseen that it might result in damage to some one. A. and E. Enc. of Law, vol. 16, p. 439; Pollock on Torts, 36, 37; Shear. and Redf. on Neg., 10. There must be, before a recovery can be had in actions for negli-

gence, a breach of duty on the part of the defendant, and the act or omission producing the breach of duty, culpable in itself, must be such as a reasonably careful man would foresee might be productive of injury; and one is not liable for an injury which he could not foresee. Smith on Neg., 24; *Blythe v. Water Co.*, 11 Exch., 781"; and in *Ramsbottom v. R. R.*, 138 N. C., 41, which has been approved fourteen times: "To establish actionable negligence, the question of contributory negligence being out of the case, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiffs under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with like duty; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed."

The evidence for the plaintiff brings the case within the accepted definition of an accident, which is "An event from an unknown cause or an unusual and unexpected event from a known cause." *Crutchfield v. R. R.*, 76 N. C., 320; *Raiford v. R. R.*, 130 N. C., 597; *Overcash v. R. R.*, 144 N. C., 579; 1 Corpus Juris, 390.

CLARK, C. J., dissenting: The plaintiff, a boy nearly 14 years old at that time, had his foot cut off by a freight train on Sunday, 17 July, 1910. The train, according to defendant's evidence, consisted of forty-five sealed box cars and a "shanty" car, and was a "double-header," *i.e.*, it had two engines in front. The extra engine was in use because the defendant had too much "power" in Selma, and wanted the extra engine in Spencer.

The injury occurred shortly after noon, in the cut 285 feet (596) west of Boylan Bridge in the city of Raleigh and in the yard limits of the defendant. At that point there are two tracks running parallel, one belonging to the Seaboard Air Line, on which the plaintiff and a friend were walking, going west, and the defendant's train on its own track came up behind, going in the same direction. The evidence on both sides was that these tracks and the space between had been greatly and constantly used by the public, and more used by pedestrians on Sunday than on any other day. There was some conflict of evidence whether there was any notice posted against the use of the tracks, or the space between them, by the public, but it was uncontradicted that, if so, no

attention had been paid, and that the defendant had never undertaken to enforce such warning.

The plaintiff and a companion were going west on the Seaboard track in said cut. The end of the Seaboard ties are 5 feet 4 inches from the end of the defendant's ties and the inside rails of the two roads 8 feet 4 inches apart. The evidence for the plaintiff is that he was walking on the end of the Seaboard ties nearest to the defendant's train; that he was 5 feet or more from the cars of said train as it passed; that his companion said to him that the train was coming up on the other track from behind; that the usual rate of speed at that point within the yard and city limits did not exceed 8 or 10 miles an hour, and that at such speed he was in no danger, and, expecting the usual speed, he did not turn around until just as the train shot by him at a speed of 25 or 30 miles an hour; that such was the impetus of the air caused by two engines and a long train at that speed that he was knocked down, and by the suction was drawn under the cars and his leg cut off above the ankle.

The defendant's evidence was that its train was not running at the time more than 6 or 8 miles an hour, and there was evidence tending to show, as the defendant contended, that the plaintiff attempted to swing up on one of the cars as it passed and, falling, lost his foot under the wheel, which passed over it. The defendant's conductor testified that the train was running from Selma to Spencer and had run the 27 miles from Selma to Raleigh in 55 minutes, but that at the time of the injury to the plaintiff the train was running about 8 miles an hour; and further, that even if it had been running at the high speed claimed by the plaintiff, there was no suction which would have drawn him under the train.

The court charged, among other things, that the only duty of the defendant was to run its train with ordinary care and in conformity to the established custom—customary speed. If it did that, it could not be liable in any aspect of this case, and the jury would answer the issue of negligence "No."

(597) But that if the defendant did not do this, and the jury should find the other contentions of the plaintiff to be true (that is, that the great speed at which the train was moving caused the windage to knock the plaintiff down and the suction threw him under the cars), and that the defendant's conduct on that occasion was the proximate cause of the injury, to answer the issue of defendant's negligence "Yes." That if the jury found that the proximate cause of the injury was the plaintiff attempting to board the moving train, to find the defendant guilty of contributory negligence.

Upon the evidence and arguments presented and the charge of the court the jury found the defendant guilty of negligence which was the proximate cause of the injury, that the plaintiff was not guilty of contributory negligence, and assessed the damages which the plaintiff should recover.

The plaintiff tendered the court a judgment in accordance with the verdict. The defendant moved the court to set aside the verdict and to enter a judgment of nonsuit. The court set aside the verdict as a matter of law and entered a nonsuit against the plaintiff.

If the court had set aside the verdict as a matter of discretion, it would have been irreviewable, but it could not then have entered a nonsuit. Revisal, 539; *Riley v. Stone,* 169 N. C., 421. The court, however, set aside the verdict as a matter of law; that is, he adjudged that the facts alleged in the complaint and proven (as the jury found) did not constitute a cause of action, and that the charge was erroneous that such facts, if found, made defendant guilty of negligence. If this was correct, the nonsuit was properly entered.

There was evidence upon the issues, and the finding of the jury thereon is conclusive as to those facts. The only question is whether the facts alleged in the complaint and found to be true by the jury justified, as a matter of law, judgment in favor of the plaintiff.

There was evidence that the defendant was rushing its train with two engines at a high rate of speed within city limits and along and parallel to the track of the Seaboard road where people were accustomed to walk and where the engineer must have seen the plaintiff with his companion walking. There was evidence not only that such high rate of speed would knock a man down, but that it did knock the plaintiff down, who must have been more than 5 feet distant from the defendant's train, and who was in no danger of being thus injured if the train had been running at the ordinary rate of speed in town limits, of some 8 or 10 miles an hour; and that being thus knocked down, the suction from such a train moving at such high speed could, and in fact did, roll the plaintiff under the car wheel, causing him to lose his leg.

There was no evidence which satisfied the jury that the plaintiff was guilty of contributory negligence in walking along the parallel track of the Seaboard Railroad on that occasion, and the burden (598) was on the defendant to prove this. Revisal, 483.

The defendant insists that it was contrary to physical law that the plaintiff could have been knocked down by the rush of air caused by the train, or that the suction could have rolled him under the cars. But that was a matter of fact for the jury to determine. The evidence was conflicting, and the jury found that the fact was as contended by the plaintiff. We do not feel called upon to distinguish the cases of *Graney*

v. R. R., 157 Mo., 666, and *R. R. v. Lawson*, 161 Ky., 39, though we think that they went off upon the question of contributory negligence, because the ruling of those courts as a matter of law cannot control the finding of fact by the jury. "We cannot argue against a fact."

The plaintiff relies upon *Munroe v. R. R.*, 85 N. J., 688, which set aside the nonsuit in a case where the deceased was standing on a depot platform, 3 feet from its edge, when a through express train ran by at 60 miles an hour, creating a current of air which threw him down and killed him. That Court was of the opinion that although the express train was going at its customary rate of speed, its failure to give reasonable signal of approach to the depot was sufficient evidence of negligence to go to the jury. In *Trieber v. R. R.*, 134 N. Y. App. Div., 661, the Court set aside a nonsuit where the decedent, 6 feet off, was swept under the car by suction, and killed.

In this case the plaintiff was not on the defendant's track nor in an obviously dangerous position. The jury found that he was not guilty of contributory negligence, but that the proximate cause of the injury was the negligence of the defendant in rushing this train at 25 or 30 miles an hour by the plaintiff when the usual speed of trains at that place, where the public were accustomed to walk, was from 6 to 10 miles an hour.

It is a novelty in the law of this State to suggest that this Court can take our own estimate of the weight of the evidence as against the finding of the jury. The well recognized maxim of English law is, "To issues of law the court responds, but to issues of fact, the jury." If the jury find contrary to the weight of the evidence, the presiding judge has the authority to set aside the verdict on that ground. This he has refused to do, showing that he thought the verdict was not in violation of the evidence. This Court has always refused to assume jurisdiction to review the action of the judge in such case. It cannot be necessary to cite the numerous authorities to this effect, for it is an elementary principle of our law and dangerous to disturb.

The expression of the plaintiff, that he was "pushed out," shows that he was speaking of being pushed out from the track on which he was walking, for he said that he was sucked under the train on the other track. This is the natural law in such cases.

(599) We know that when by the passage of a rapidly moving body a vacuum is created, the air rushes in to fill the vacuum. Here, if, as the witness testified and the jury found to be the fact, the train was moving at great speed, it drove aside the air in front of it and the vacuum thus created was necessarily filled by the inrush of the air from the sides, as can be seen in any rapidly moving train picking up chips and

paper and small articles at any time. The inrush of the air is often terrific.

We know that the terrible tornadoes and hurricanes which destroy forests and cities and shipping and oftentimes cause great loss of life are caused by the tropical sun rarefying the air which rises, leaving a semi-vacuum into which the air rushes from long distances. At the battle of Sharpsburg (or Antietam) the writer of this opinion was in the act of speaking to General Armistead (who afterwards found a soldier's death at Gettysburg), who, drawn sword in hand and on foot, was leading his brigade into action, when a huge shell passing at that instant just to the other side of the General, he plunged forward, his sword flying one way and his hat the other. His staff officers, thinking both legs had been shot off at the knees, sprang forward to raise him up, when they found that he was uninjured and without a scratch even, except where his face had struck the ground. The force of the air rushing in to fill the sudden vacuum had knocked him down just as if he had been felled by a blow from a heavy stick on the back of his head.

The evidence of the witness is in accordance with the well known action of air in such cases, and can be found illustrated in any work on physics under the head of "Ballistics." The air was split open by the head of the engine, leaving a vacuum along the track into which the air rushed, pushing the plaintiff under the train, if his evidence is to be believed, which was a matter solely for the jury, not for us. Water is somewhat denser than air, but any boy who has thrown a large stone into a shallow millpond knows that, in like manner, it will create a vacuum, laying bare the bottom of the pond, which the water rushes in to fill.

It will be a dangerous innovation if the courts on appeal begin to take their own estimate of what a jury should believe or should not believe, instead of accepting their verdict as the lawful triers of the fact, as final, when the trial judge refuses to disturb it.

Though modern research has demonstrated that we do not owe trial by jury to Magna Carta, and that it originated years after, still for long centuries it has been the great bulwark of right in Anglo-Saxon law that every citizen, however humble, could have the facts in controversy found by a jury of his peers. The plaintiff in this contest with the defendant was entitled, like all others, to have the disputed fact, the vital fact, the material fact, whether or not he was swept under the train and injured, as he alleges, by the suction caused by the negligence of the defendant in running its train at an excessive (600) speed in close proximity to the plaintiff, decided by a jury of his peers, and to have the historic Twelve, "The Great Twelve," stand between him and the defendant. A disputed matter of fact is no more in

the province of this Court to determine than it is in the province of the trial judge.

It was also in evidence by defendant's witnesses that the train was running from Selma to Spencer on Sunday, carrying forty-five cars of freight, and that there was no live stock or fruit or other perishable freight. Under Revisal, 3844, the defendant was indictable and subject to a fine of not less than $500. There was no evidence which withdrew the defendant from liability for misdemeanor under said section, or under Revisal, 2613, and under the amendment thereto, Laws 1909, ch. 285. It is true that the defendant's conductor testified that the cars had come from Pinner's Point, Va.; but this train had been made up at Selma, and he said that some of the cars were going beyond Spencer. This matter was considered in *S. v. R. R.*, 119 N. C., 814, and it was held that the act was constitutional, and not an interference with interstate commerce, cited since in *S. v. R. R.*, 149 N. C., 470. It is true that in an indictment under this statute a new trial was granted below in *S. v. Ry.*, 145 N. C., 570, but it was for the use of the expression, "If the jury find from the evidence," which has been repeatedly held since not reversible error. *Walker, J.*, in *Holt v. Wellons*, 163 N. C., 131, and cases there cited. If the defendant was running in violation of the statute it was guilty of negligence, as a matter of law, as has often been held. However, this point was not pressed below, and there was no ruling upon it and no exception upon that ground.

The judgment setting aside the verdict and entry of a nonsuit ought to be reversed and the case remanded to the lower court, that judgment might be imposed upon the verdict according to law. *Wood v. R. R.*, 131 N. C., 48; *Shives v. Cotton Mills*, 151 N. C., 294; *Ferrall v. Ferrall*, 153 N. C., 179. The defendant will then be entitled to enter its appeal and have the statement of the case made up on appeal setting out the exceptions, if any, which it caused to be entered by the judge during the trial, Revisal, 536, 591, and its assignments of error, should it choose to appeal.

It will be noted that more than five years have elapsed since this injury occurred. There is no indication that either party is in any wise to blame for this delay. But the frequency with which cases come to this Court, after similar or even longer delays, makes it proper, as we have done, to call the matter again to the attention of the lawmaking body. Such delays cause heavy costs to accumulate and witnesses die or their memory becomes indistinct. One of the pledges of Magna Carta was that "justice should not be delayed."

HOKE, J., concurs in dissent of CLARK, C. J.

Cited: Zageir v. Express Co., 171 N. C. 694 (f); *Wyrick v. R. R.,* 172 N. C. 551 (2f); *Rankin v. Oates,* 183 N. C. 518 (p), *Rankin v. Oates,* 183 N. C. 524 (j); *Owens v. R. R.,* 196 N. C. 308, 309 (3g); *Harrison v. R. R.,* 204 N. C. 720 (2g); *Wallace v. Longest,* 226 N. C. 167 (6p).

(601)

GEORGE H. SMATHERS ET AL. v. E. H. JENNINGS ET AL.

(Filed 12 January, 1916.)

1. Deeds and Conveyances—Defective Probate—Evidence—Identification of Lands.

Where a deed in the chain of title of a party in an action to recover lands refers to another deed, the latter deed may be offered in evidence to identify the lands, or in aid of the description in the former deed, though having a defective probate: and where such deed has afterwards been registered upon a proper probate, the objection becomes immaterial.

2. Wills, Foreign—Correct Certificates—Lands.

Objection to the introduction of a will in plaintiff's chain of title in an action to recover lands, situated in North Carolina, on the ground that the record from the Orphan's Court of Baltimore was not properly certified, is untenable, it appearing that the register and custodian of wills certified under seal that it was a true copy; the presiding judge that the certificate of the register is in due form, and the register certified under seal that the person signing the last certificate was the presiding judge of the court.

3. Appeal and Error—Registration—Damaged Records—Immaterial Evidence.

In an action to recover lands, certain pages of the registration books, admitted to be genuine, were put in evidence to aid the description of the lands described in a deed in the plaintiff's chain of title, and testimony, over the defendant's objection, was admitted that during the Civil War the then register of deeds had hidden the books under a log he afterwards had difficulty in finding, and that the book was damaged. Under the circumstances of this case the admission of the evidence is held as immaterial.

4. Trials—Instructions—Burden of Issues—Burden of Proof.

Where in an action to recover lands the trial court has placed the burden of the issue on the plaintiff, and instructs the jury that he must establish his title by the greater weight of the evidence, and that if he had done so, then the burden of proof was on the defendant to establish his title by adverse possession under color, the charge does not shift the burden of the issue from the plaintiff, and it is not objectionable.

APPEAL by defendant E. H. Jennings from *Cline, J.*, and a jury, at May Term, 1915, of JACKSON.

The plaintiffs, claiming to be the owners in fee of two tracts of land located in Jackson County, sued the defendants under section 1589 of Revisal of 1905, alleging that the lands were granted by the State to one John T. Foster, and that they derived title by various *mesne* conveyances from and through said John T. Foster, and that they are informed that the defendant E. H. Jennings claims to be the owner of an estate or interest in said two tracts of land, which claim is adverse to the rights of these plaintiffs, and that the said R. G. or Richard Jennings also makes some kind of a pretended claim to said two tracts of land.

The defendant E. H. Jennings denies the allegations of the plaintiffs and admits that if the two tracts of land claimed by plaintiffs and
(602) described in their complaint are embraced within the lands of the defendant E. H. Jennings, he, the defendant E. H. Jennings, claims an estate and interest therein adverse to plaintiffs.

The defendant R. G. Jennings answers and says that he has no estate or interest in the land claimed by the plaintiffs and claims none, and, further, denies that he has trespassed upon said lands by fishing or otherwise.

A judgment dismissing the action as to R. G. Jennings was entered.

After the commencement of the action the plaintiffs conveyed all of their claim to the lands in controversy to the Wolfe Mountain Lumber Company, and this company was made a party plaintiff before the trial and adopted the complaint of the plaintiffs therein.

In the progress of the trial defendants excepted to certain documents offered in evidence by the plaintiffs and to various portions of the charge of the court below.

The jury returned the following verdict:

1. Are the plaintiffs the owners of the lands described in the complaint as State Grants Nos. 190 and 191, and as located on the maps? Answer: "Yes."

2. Do the defendants, or either of them, claim an estate or interest in and to said Grants Nos. 190 and 191, or any part thereof, adversely to the title of plaintiffs? Answer: "Yes."

3. What damage, if any, are plaintiffs entitled to recover of defendants? Answer: "$1."

The defendant E. H. Jennings appealed from the judgment rendered upon the verdict.

A. Hall Johnston, Eugene Ward, Coleman C. Cowan for plaintiffs.

Merrimon, Adams & Adams for defendants.

ALLEN, J. There are numerous exceptions in the record, but those relied on in the briefs may be considered under four heads:

(1) Plaintiffs introduced as a part of their title original deed of release from Charles F. Mayer to Thomas M. Lanahan, dated 23 April, 1856, and duly recorded in the office of the register of deeds for Jackson County, in Book TT, at page 351, 25 May, 1910, the description in which was as follows, to wit: "All those lands, tracts and parcels situate in Jackson County, State of North Carolina, Thomas B. Lemon conveyed to Mayer by deed dated 17 October, 1855, and registered in said county, in Book A 1, pages 498, 499, 500, said lands consisting of twelve parcels, each of 640 acres, and containing in the aggregate 7,600 acres."

This deed was also recorded in Book A 1, page 753, 17 September, 1856.

For the purpose of aiding the description in the deed of Mayer to Lanahan, recorded, as aforesaid, in Book TT, page 351, plaintiffs offered certain sheets numbered 498 and 499, which were ad- (603) mitted to have been a part of old Book A of the office of the register of deeds for Jackson County, and on which there purported to have been copied the deed from Thomas B. Lemon to Charles F. Mayer, dated 17 October, 1855, and the probate appearing upon these sheets, and upon which the deed purported to have been recorded, was in words and figures as follows, to wit:

STATE OF MARYLAND—CITY OF BALTIMORE.

On this the 17th day of October, A. D. 1855, before me, Jabez D. Pratt, a commissioner of North Carolina for the State of Maryland, to take the acknowledgment of deeds and to be used or recorded in North Carolina, personally appeared Thomas B. Lemon, personally known to me to be the person named in the aforegoing instrument of writing, and acknowledged the signing and sealing the same to be his voluntary act and deed and desired the same to be recorded as such, and did also acknowledge the memorandum subjoined to said instrument.

Witness my hand and official seal affixed the day and year last aforesaid. JABEZ D. PRATT,

(Seal.) *Commissioner of North Carolina.*

Witness: W. R. BUCHANAN.

To which said record the defendant objected; objection overruled, and the defendant excepted, the court stating that the record was admitted, not because of the sufficiency of the probate, but in order to aid, in so far as it did aid, in the description of the deed offered in evidence upon the probate and registration of 25 May, 1910, and not in itself as a link in plaintiff's chain of title, but only as evidence of the document

referred to, for description in the release deed from Charles F. Mayer to Thomas M. Lanahan.

This deed from Thomas B. Lemon to Charles F. Mayer was afterwards registered in 1909, upon a probate to which there is no objection.

The exception to the introduction of the deed from Lemon to Mayer when first registered upon a defective probate becomes immaterial in view of the fact that it was afterwards registered upon a probate free from objection; but if the probate had not been perfected we are of opinion the record where it was first registered was competent for the purpose for which it was offered, the identification of the land conveyed in the deed from Mayer to Lanahan.

When one deed refers to another for a description, the description in the first deed must be considered as if it had been inserted in the second, and the latter must be construed with that description in it (*Gudger v. White,* 141 N. C., 515), and this is true although the first deed may not be registered. *Collins v. Asheville Land Co.,* 128 N. C., 563; *Watson v. Hinson,* 162 N. C., 72; 13 Cyc., 634; 8 Ruling Case Law, 1078.

(604) In the first of these cases it was held that a plat referred to in a deed executed since 1885 was competent to aid the description, although unregistered, and in the second that a writing recorded as a will upon a defective probate might be incorporated in a subsequent will, properly probated, by reference to it.

It is said in 13 Cyc., 634, "Where a plat is referred to in a description in a deed it may be used to identify the land conveyed, although it does not conform to the statute," and in 8 R. C. L., 1078, "Real estate is sufficiently described in a conveyance by reference for identification to another deed or record specifically mentioned therein which accurately describes it. The map or plat referred to need not be registered."

(2) The plaintiff introduced as a part of their title the wills of Israel M. Parr and Mary Bowen Parr, probated before the Orphan's Court of the city of Baltimore and recorded in Jackson County. The defendant objected upon the ground that the record was not properly certified, relying on *Riley v. Carter,* 158 N. C., 484.

An examination of the record in the *Riley-Carter case* shows that no defect there pointed out is apparent in this record.

The probates of the wills before us appear to be in due form; the register and custodian of wills certifies under seal that it is a true copy; the presiding judge certifies that the certificate of the register is in due form, and the register certifies under seal that the person signing the last certificate was the presiding judge of the court. The wills were properly admitted in evidence.

(3) T. A. Cox, a witness for the plaintiffs, testified, over the objection of the defendant, that there was a general reputation that the three

books from the register's office, A, B, and C, were taken during the war by the then register of deeds and hid under a log; that he forgot the log and had to search a long time before they were found, and that they were badly damaged, etc.

We cannot see that this evidence affected the result upon the issues submitted to the jury, and as it appears to have been admitted for the purpose of identification, it became immaterial upon the abandonment by the defendant of his objection to the introduction of the grants upon which the plaintiffs rely, and upon the admission of the genuineness of the sheets offered from Book A.

(4) His Honor charged the jury on the first issue: "The burden of this issue is fixed by the law upon the plaintiffs, which requires them to satisfy you by the greater weight of the evidence that they are the owners of the land described in these two State grants, and that it is as located on these court maps. The plaintiffs are relying upon a paper title to establish their contention of ownership. They take the position here that they have shown a grant from the State of North Carolina to both of these tracts of land, 190 and 191, and that they have connected themselves by *mesne* conveyances, which they say give to (605) these plaintiffs, and down to the Wolfe Mountain Lumber Company, the title which the original grantee from the State had in these lands."

He then called the attention of the jury to the deeds in the plaintiffs' chain of title down to a deed to Israel M. Parr, George U. Porter, and Thomas N. Keerl, dated in 1858, and instructed the jury that the burden was on the plaintiffs to satisfy the jury that the next deed in the chain of title was executed by the heirs and devisees of the grantees in the deed of 1858.

He then charged the jury: "If you are satisfied by the greater weight of the evidence that these depositions that were offered in evidence by the plaintiffs correctly show who are the heirs at law of Israel M. Parr and Mary B. Parr, George U. Porter and Thomas N. Keerl, and that they are the true persons who had to execute a deed to convey the title of these three men, deceased, why then, in such case, that is, if they were the heirs and devisees in the will who had the legal title in them by operation of law, or by will, and they are the same persons who conveyed it again, then, to Smathers and Thomas and then on down through them to the Wolfe Mountain Lumber Company, why, upon such findings of fact by you, I instruct you the law is that the deeds are sufficient in form to convey the title, and it would be a connected chain of title from John T. Foster, and those claiming under him, down to the Wolfe Mountain Lumber Company."

This part of the charge is excepted to, but it is not separately considered in the brief.

He further charged the jury: "Now, that is not all they have to do, if they have done that. It is for you to say whether they have shown you, by the greater weight of the evidence, the heirs at law of Parr, Porter, and Keerl, and you are to find the facts upon the questions that I have submitted to you. I say if you find they have done that, shown a paper title in themselves for these old grants, 190 and 191, then there is another thing that they must do before the plaintiffs can ask you to answer this first issue in their favor, at all, and that is, they must locate these grants. They cannot say simply, 'We have got the title,' but they must show you where the land is; they must locate it, and then, later on, they must show you that there is some interference, some claim of title on the same land, by these defendants.

"Well, to conclude this part of the charge, it is a question of fact for you; not a question of law. Does the evidence satisfy you by its greater weight that these plaintiffs have located these two grants as they are laid down here on these court maps?

"Now, the law is this way, gentlemen: if you are satisfied, by the greater weight of the evidence that the plaintiffs have made out their connected chain of paper title to these two old grants, and then (606) you find that they have correctly located them, according to the lines on the court maps which represent their contentions, then, nothing else appearing, it would be your duty to answer this first issue 'Yes.'

"I want you to listen to that expression, gentlemen, 'nothing else appearing,' because there is another side of the case to be considered upon this issue. We have to take one step at a time. That is the only way my mind can operate, and I think it is the only way yours can. We will have to take it and just develop the whole thing, if we can, one leaf unfolding and another, until we have the flower open before us.

"I say, if they did that, nothing else appearing, it would be your duty to answer this first issue 'Yes.' Why? Because the law is if they connect with the grant and then locate the land, if there was no other evidence in the case, then the law, which gives them the constructive possession of the land, would say that it is their land. It does not matter what length of time had elapsed, or whether anybody had been on it or not, I say the law would give the ownership—a judgment, rather—to the person who had the connected chain of title from the State and could locate his land.

"Now, if you get that far, it does not answer this first issue, but it simply does this: it would answer the issue, as I have said, unless the defendant can come forward with some evidence in the case here—not

by offering witnesses, necessarily, for he could use the plaintiff's witnesses, if sufficient. Then the defendant would have to show the jury, in opposition to that title and to overcome it, that he had a title which, in law, would supplant that legal title and take it out of the plaintiffs and give it to the defendant. In other words, the law is that the duty of coming forward then with some proof to overcome this *prima facie* case devolves upon the defendant in this action.

"Well, now, he recognizes that as being the law, and he says he does come forward here with evidence that he says ought to show you that he, and not the plaintiffs, is the real owner of this land. He is only required to establish his contention by the greater weight of the evidence; not any more degree of proof than was imposed upon the other party, at the outset. And he says that he has established that, and he asks you to find that he is the owner by possession under color of title.

"If you find from the evidence that the plaintiffs have located the said grants as contended by them, as shown by the solid lines on the map, and should further believe the evidence as to who are the sole heirs at law of Thomas N. Keerl, Mary B. Parr, Israel M. Parr, and George U. Porter, the court charges you that the plaintiffs have made out a *prima facie* case, entitling them to recover in this action, nothing else appearing, and the burden of proof thereby is shifted to the defendant to show either a senior and superior title from the State of North Carolina for the said lands or to connect himself with a superior title from a common source in plaintiffs' title, or to show colorable title and (607) continuous, open, notorious, adverse, and exclusive possession in himself and those through, by and under whom he claims, under such color for seven years prior to the institution of this suit."

The statement of the contentions of the parties and parts of the charge not relevant to the defendant's exceptions are omitted. The defendant relied on an adverse possession under color.

The defendant excepted to the latter part of the charge, insisting that it placed the burden of the first issue on him; but we do not so read the charge.

His Honor distinctly charged the jury that the burden of the first issue was on the plaintiffs, and then that they must satisfy the jury by the greater weight of the evidence of the truth of each fact upon which the title of the plaintiffs depended.

He then told the jury, if these facts were established, that the plaintiffs would be entitled to have the issue answered in their favor, nothing else appearing; and that if the defendant wished to further contest the right of the plaintiffs he must go forward with the proofs and satisfy the jury as to his claim of adverse possession under color.

When he said "the burden of proof thereby is shifted to the defendant" the statement was predicated upon a finding by the jury of the facts relied on by the plaintiffs, and which in the absence of other evidence made out their title, and he did not then charge the jury that the burden of the issue shifted, but that the burden shifted to prove adverse possession under color.

This is clearly the meaning of the charge, and, so understood, it is free from error.

We have carefully considered the whole record, and find

No error.

W. B. CLIFTON v. A. L. OWENS AND J. E. REID, SHERIFF.

(Filed 12 January, 1916.)

1. Executions—Levy—Realty—Possession.

The sheriff has neither property nor a right to possession under a levy on land, but only a naked authority to sell, and his sale transfers only a right of property to the purchaser; and he cannot deliver the possession, under the execution, without the consent of the one holding it.

2. Executions—Levy—Personalty—Possession.

A levy of *fi. fa.* on chattels vests in the sheriff a special property which enables him to sell them after the return day, without a *ven. ex.*, and to deliver the possession to the purchaser.

3. Levy—Conversion—Judgment Liens—Equity.

Where lands are devised for life and by the terms of the will then to be sold and the proceeds distributed to designated persons, the interest of one of such persons may not be levied upon either as lands or personalty, though under the terms of the devise the lands will be regarded as personalty when so sold, the remedy being by an action in the nature of a life estate, as personalty, one of such distributees has no interest creditor may be preserved and protected.

4. Same—Devise—Lands—Personalty—Trusts and Trustees.

A devise of lands for life to the widow, then with bequest to certain named of testator's children, "to have the said property, and the same to be sold and the money coming from said sale to be divided among" the testator's said children: *Held*, the intent of the testator as gathered from the terms of the will is controlling, and thereunder the devisees named have only the naked title, to be held by them in trust until the lands shall be sold, and the proceeds, upon distribution, go directly to them as personalty, under the equitable doctrine of conversion.

5. Executions—Levy—Conversion — Life Estates — Distributions — Judgment Liens—Equity—Suits.

Where under the equitable doctrine of conversion the legatees under a will are to take the proceeds of the sale of lands, after the falling in of a life estate, as personalty, one of such distributees has no interest in the property, during the continuance of the life estate, which is subject to levy under a judgment against him, the right of the judgment creditor to subject such interest to the satisfaction of his lien arising only upon the death of the life tenant. Revisal, secs. 629, 630, have no application.

6. Executions—Levy—Conversion—Exemptions.

Where after the falling in of a life estate in lands the lands are directed to be sold and the proceeds distributed and held as personalty, and the judgment creditor then brings suit to subject the interest of one of the distributees to the satisfaction of his judgment lien, such distributee may claim his personal property exemption therein.

CIVIL ACTION, heard by *Whedbee, J.*, at June Term, 1915, of (608) WASHINGTON Superior Court, upon a case stated for his opinion, and the judgment of the court, in a controversy submitted without action under the statute. Plaintiff appealed.

The facts are as follows:

1. On 9 February, 1915, A. L. Owens regularly obtained judgment against plaintiff W. B. Clifton in the court of a justice of the peace in Washington County in the amount of $147.50, and said judgment was on said day properly docketed in the Superior Court.

2. On 24 March, 1915, said A. L. Owens, judgment creditor, caused an execution, regular in form, to be issued from the Superior Court of Washington County, directed to the sheriff, J. E. Reid, directing him, as sheriff, to levy upon and sell, to satisfy said judgment, the personal and real property of the said W. B. Clifton.

3. J. E. Reid, sheriff of Washington County, did on 2 April, 1915, duly levy upon said alleged interest of W. B. Clifton in the real property mentioned herein, and pursuant to said levy did adver- (609) tise the interest of W. B. Clifton in said real estate as required by law, said sale to be made on 31 May, 1915, it being the first day of a regular term of Superior Court for said county.

4. The only claim or interest which W. B. Clifton has in the real property herein mentioned, and now advertised for sale by the sheriff, descended to him under the last will and testament of his father, Thomas Clifton, which will is duly probated and recorded in the office of the clerk of the Superior Court of Washington County, North Carolina.

5. The will of Thomas Clifton as it appears of record in Washington County is as follows:

STATE OF NORTH CAROLINA—WASHINGTON COUNTY.

I, Thomas Clifton, of the above named county and State, being of sound mind and disposing memory, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament:

(1) My executor, hereinafter named, shall give my body a decent burial and pay all funeral expenses, together with all my just debts, out of the first money which shall come into her hands belonging to my estate.

(2) I give and devise to my devoted wife, Penelope C. Clifton, the tract of land whereon I now reside, containing 40 acres, for her natural life, in satisfaction of her dower third in my land, and after, I will and bequeath said land whereon I now reside to my children, Samuel, David, Warren, John Benjamin [the latter the plaintiff herein], Ernest, and Lucy Clifton, and Lula, wife of George Keel, and to the children of Evora Skiles, now deceased, my daughter, to have the said property and the same to be sold and the money coming from the sale of said land to be divided among my said children just named, and an equal amount to my Skiles grandchildren to represent their mother's share as if she were living.

(3) I give and bequeath to my son-in-law, George Keel, $75 in money, to him already paid.

(4) I give and bequeath to my son, Samuel Clifton, $130 in money, to him already paid.

(5) I give and bequeath to John Skiles, my grandson by my daughter Evora, $60, to him already paid.

Items third, fourth, and fifth represent money already paid by me to the respective persons named, and I wish and devise to have these amounts deducted from what ever amount the sale of my land hereinbefore provided for shall bring to them, in order that all my children shall share equally.

(610) (6) I hereby constitute and appoint my beloved wife, Penelope C. Clifton, my lawful executrix to execute this my last will and testament made by me.

In witness whereof I, Thomas Clifton, do hereto set my hand and seal this 23 September, 1893. THOMAS CLIFTON. [Seal]

Duly witnessed and probated.

6. That unless restrained by law the sheriff of Washington County will proceed to sell at public sale the lands and property which he has

levied upon, and the aforesaid sale is claimed by the plaintiff to be a wrongful invasion of his rights. The plaintiff contends that he owns no present vested interest in land which could be sold under execution, and that his only equity or title is a right to share, as provided in the will of his father, in the proceeds which may be derived from the sale of the said land mentioned in the above will. That this interest does not accrue until the death of the life tenant, Mrs. Penelope C. Clifton, who is now living, and that then plaintiff will be entitled, as against said A. L. Owens' judgment, to a personal property exemption of $500, as provided by law. Or that, if the interest of the plaintiff is now vested, he is entitled, as against said judgment, to said personal property exemption of $500, as under said will there has been a conversion of said property from real estate to personalty.

7. The defendants contend that the plaintiff's interest is a vested remainder in land, subject to the life estate of Penelope C. Clifton, who is yet living, and that, since the said plaintiff is not entitled to a homestead on account of the existence of the life estate in Penelope C. Clifton, the present right and remainder now vested in plaintiff in said land can be sold and conveyed by the sheriff under said execution.

8. The sole question presented here is whether or not the interest of plaintiff is such an interest in property, whether real or personal, as that at present it can be sold by the sheriff under the execution above mentioned.

L. W. GAYLORD,
Attorney for Plaintiff.
W. M. BOND, JR.,
Attorney for Defendants.

JUDGMENT.

This cause coming on to be heard upon this controversy submitted without action, the parties being properly before the court: It is upon said agreed facts considered and adjudged that W. B. Clifton now owns a vested remainder in fee simple in and to an undivided interest in the land described in complaint, as devised to plaintiff by his father. That said W. B. Clifton is not entitled to a homestead allotment in said land, and that his said undivided interest is subject to the lien of A.L. Owens' judgment, and the sheriff, J. E. Reid, by virtue of his (611) office shall sell the undivided interest of W. B. Clifton in said land set out in the case agreed. This 21 May, 1915.

H. W. WHEDBEE, *Judge.*

Plaintiff excepted and appealed to this Court.

Plaintiff groups his exceptions and assigns errors as follows:

1. The court erred in signing the judgment as set out in the record.

2. The court erred in adjudging that, under the will of Thomas C. Clifton, as appears in the record, there was not a conversion of the real estate mentioned therein from real estate to personalty.

3. The court erred in adjudging that the interest of W. B. Clifton was an interest in land and as such subject to levy and sale by the sheriff under execution.

L. W. Gaylord for plaintiff.
W. B. Bond, Jr., for defendant.

WALKER, J., after stating the case: The levy of the sheriff was not upon personalty, but upon land, as realty; so that if he could have levied upon it as personalty, he did not do so. In order for such a levy to be validly made the personalty must be taken into the sheriff's possession or placed under his control. *Gilkey v. Dickerson,* 10 N. C., 293; *Tredwell v. Rascoe,* 14 N. C., 50; *Smith v. Spencer,* 25 N. C., 256. As held in *Barden v. McKinnie,* 11 N. C., 279, the levy of a *fi. fa.* on chattels vests in the sheriff a special property which enables him to sell them, after the return day, without a *ven. ex.;* but a levy on land gives him neither property nor a right of possession; he has only a naked authority to sell, and his sale transfers a right of property to the purchaser, and he cannot deliver possession, under such an execution, without the consent of the tenant or he who has it. It is because of this distinction in the levy of an execution upon realty and one upon personalty, and also because of the peculiar and intangible nature of the property, when considered merely as converted without being actually so, that the courts have uniformly held that, when such an equitable conversion has taken place, the property cannot be levied upon, under execution, as land nor as personalty. *Paisley v. Holshn,* 83 Md., 325; *Crouse v. Hardt,* 47 *ibid.,* 433; *Turner v. Davis,* 41 Ark., 270; *Chick v. Ives,* 90 N. W. (Neb.), 751; *Hunter v. Anderson,* 152 Pa. St., 386; *Henderson v. Henderson,* 133 Pa. St. 399, and as an analogy, *Dalker v. Killian,* 62 S. C., 482.

It is said in 9 Cyc., at p. 852, that "Where a testator directs his executor to sell his land and divide the proceeds among designated legatees, it is well settled that such legatees have no estate in the land which is the subject of lien or execution, and that an obvious result of
(612) conversion is the right of the beneficiary to deal with the property as in its changed form before such change has been actually affected." It may be asked, If this be so, what is the creditor's remedy? It is as fully decided as the other proposition. Conversion is altogether

a doctrine of equity; in law it has no being, and it is admitted only for the accomplishment of equitable results, and, of necessity, it must be limited to its end. *Foster's Appeal,* 74 Pa., 397. It is, therefore, highly proper that a court of equity should deal with it in enforcing the rights of beneficiaries as well as others having claims against them, and, besides having taken away the remedy by the process of execution, as it cannot be treated as land, because of the conversion, though a notional or imaginary one, which renders it so intangible in its nature that the officer cannot lay his hands upon it and reduce it to his possession, it is fitting, if not obligatory, that equity should furnish some adequate and efficacious remedy by which the property or interest of the judgment debtor thus derived may be subjected to the claims of his creditors; and it has done so. The subject is fully and exhaustively treated in a very able and learned opinion by *Justice Eakin* in *Turner v. Davis,* 41 Ark., 270. It appeared in that case that a judgment creditor of a beneficiary under a trust conversion had levied on and sold his interest in the realty, as land, under an execution at law to satisfy his judgment, and another judgment creditor afterwards proceeded in a court of equity to set aside the sale and to have his interest sold under a decree of the court by a commissioner or special master. It was held that there had been an equitable conversion of the land into money, and it left no estate in the beneficiary which was subject to levy and sale under execution at law, and that as one entitled to the proceeds of the sale of land has no interest in the *land* itself, subject to execution, the judgment creditor's remedy was in chancery, which is an adequate substitute for the remedy at law against the land, if there had been no conversion. *Justice Eakin* said: "There being no interest in the land, considered as land, it logically follows that a creditor of one entitled to the proceeds mistakes his remedy by levying upon the land itself. Everything substantive eludes his grasp. His proper course is to pursue the proceeds, and to take steps to have them realized, which is within the power of a court of equity. Otherwise, he would have it in his power to compel his debtor to elect to take the land in its natural character against his own wishes, and against the will of the other beneficiaries, who are entitled to have the whole interest in the land sold at once, at the best rates, for division of proceeds; in other words, to compel the debtor to do what he has no right to do." *Justice Eakin* further remarked that it could not be conceived how the question is affected, or even touched, by the statute regarding property subject to execution, which is substantially like ours, subjecting legal and equitable interests to ordinary executions at law; and in the nature of things this must be true, and (613) his reasoning upon the entire question is so conclusive as to leave no peg to hang a doubt on.

Before leaving this part of the case, we will again emphasize the fact that the sheriff has not attempted to levy upon this property, as personalty, and he could not do so, for such a thing is physically impossible, it not being anything that he can seize and take into his possession or bring under his control; but he has levied only on the land itself, when the judgment debtor plainly has no interest therein, for he takes not that under the will, but the proceeds of its sale. As to the lien of the creditor, it does not exist under the judgment, as there was no land for it to rest upon, but by filing his bill in equity (now his complaint in a civil action), the judgment creditor acquires what is equivalent to a lien as against other cerditors from the date thereof, it being regarded and treated as in the nature of an equitable *fi. fa.*, which gives priority or preference to the suing creditor and prevents the debtor from defeating, by a conveyance, the object of the suit. *Dixon v. Dixon,* 81 N. C., 323. Equity took jurisdiction, at the instance of a judgment creditor, in two cases, first as an aid to the enforcement of process at law, by removing some impediment or hindrance in the way of its effective execution, and, second, where it was original, for the purpose of granting relief, on the ground that the debtor had an interest which is not accessible to the creditor by the ordinary process of execution, and sale thereunder, but which should in good conscience be applied to the satisfaction of his debts, and, further, because otherwise the creditor would be without remedy. *Dixon v. Dixon, supra; McKay v. Williams,* 21 N. C., 398; *Brown v. Long,* 36 N. C., 190. The case of *Dixon v. Dixon, supra,* also decides that property converted from its original nature, as land into money, is not subject to the lien of a judgment or to sale under execution issued thereon, although the statute gives a lien, under the judgment, on all the real property of the debtor in the county, which, by construction of this Court, embraced both legal and equitable estates, citing *Wall v. Fairley,* 77 N. C., 105; *Page v. Goodman,* 43 N. C., 16.

Having disposed of these preliminary matters, the way has been cleared for an approach to the remaining and pivotal question in the case, which we will now consider, viz., Whether there has been a conversion of the land into personalty by this will.

Equitable conversion is a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. "Nothing," it has been said, "is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever
(614) manner the direction is given, whether by will or by way of contract, marriage articles, settlement, or otherwise; and whether

the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be coveyed, the owner of the fund, or the contracting parties, may make land money or money land. . . . By this and similar declarations the judges do not mean to assert a solemn piece of legal juggling without any foundation of common sense, but simply to lay down the practical doctrine that for certain purposes of devolution and transfer, and in order that the rights of parties may be enforced and preserved, it is sometimes necessary to regard property as subject to the rules applicable to it in its changed and not in its original state, although the change may not have actually taken place." Bispham's Equity (6 Ed.), sec. 307. Conversion may arise not only under a trust in a will, but also under settlements and other instruments *inter vivos,* as we have seen. In order to effect a conversion, it may be stated generally, that in a trust the direction to convert must be imperative, and in a contract the agreement must be binding. In the case of a trust created by will or otherwise the duty to convert must be mandatory and not left merely to the option or discretion of the executor or trustee, and this imperative quality may be impressed upon the trust either expressly or by the use of direct words of command, or impliedly or indirectly by a disposition of the property on such limitations as necessitate a change in character of it. "If a testator devises land to be sold, or orders or directs that the same shall be sold, it is obvious that it is the imperative duty of the trustees to make the sale. They have no discretion in the matter. They are simply to turn the real estate into personalty and to apply the money thus realized to the purpose designated in the will. This is the plainest case of conversion." Bispham's Equity, p. 426.

So it is said that the doctrine of conversion is not confined to those testamentary dispositions only in which imperative words are used, or wherein limitations which can only be effectuated by a conversion exist. It is to be applied to all those cases in which a general intention of the testator is sufficiently manifested to give the property to the donee in a condition different from that in which it exists at the time when the will goes into effect. A mere testamentary power of sale, vested in executors to sell real estate, will not work a conversion; but if to the power there is added a direction, a conversion will be effected. There must be an intent to convert, either express or implied. The question always is, Did the testator intend to give money or to give land, and has that intention been sufficiently expressed? Once arrive at the intention, by proper rules of interpretation, and the property will then be considered as impressed with that character which the testator designed it should have when it reached the hands of the beneficiary. While a discretion in the trustees as to whether a sale shall or shall not take (615)

place will of course prevent a conversion, yet a mere discretion as to the *time* or manner of sale will not hinder a conversion. Bispham's Equity, p. 426, sec. 312. *Benbow v. Moore,* 114 N. C., 263. The effect or result of this doctrine of equity is that the court carries out the principle of conversion in all its consequences. Thus, money directed to be turned into land descends to the heir; and land directed to be converted into money goes to personal representatives; money belonging to a married woman which is directed to be converted into land is liable to the husband's curtesy; an alien, though incapable of taking land for his own benefit, can take the proceeds of land directed to be sold; and in many other cases the enjoyment of property will be determined by the rules applicable to it in its changed and not in its original state. Bispham's Equity, p. 428. But it is said that the property is not for all purposes to be treated as in its converted state, the constructive or notional conversion not being equivalent always to an actual or a real conversion, and there is an important qualification of the doctrine, not applicable, though, to the facts of this case, that the conversion is limited to the purpose of the donor, and, therefore, in the event that the purpose fails, the property will devolve according to its original character. But we need not enlarge upon these questions, and have mentioned them only as being necessary to a complete understanding of this principle of equity, in all its bearings and as to all of its constituent elements, and also its limitations, so far only as they have relation to the questions now before us.

The correlative doctrine of reconversion is well understood to be the imaginary process by which a prior constructive conversion is annulled and taken away, and the property restored, in contemplation of equity, to its original actual quality, or where the direction to convert is revoked by act of law, or by the parties entitled to the property, which they may elect to do (Snell's Equity, 160), but where there are several beneficiaries they must all, as a general rule, unite in the election in order to make it effectual. Bispham, sec. 323; *Holloway v. Radcliffe,* 23 Beav., 163; *Beatty v. Byers,* 18 Pa., 105. A remainderman cannot elect so as to affect injuriously the interests of those who own prior estates; nor can a lunatic himself elect, as being devoid of capacity to make a discreet choice, or to act for himself; nor can an infant make such a binding election ordinarily, for the same reason; but it may be done for him when found to be for his benefit. 19 Cyc., 855, 866; 2 Spence's Eq., 271; *Crabtree v. Bramble,* 2 Atk., 686; *Cookson v. Cookson,* 12 Cl. and Fin., 146 Snell's Eq., 162; *Ashby v. Palmer,* 1 Mer. Ch., 296; *Seeley v. Jago,* 1 P. Wms., 389; *Robinson v. Robinson,* 19 Beav., 494; Bispham's Eq., sec. 324. Married women could, formerly, elect by means of the pious fraud of a sham purchase of real estate, and subsequently levy-

ing a fine, or giving her consent in open court to receive the (616) money or personalty. *Oldham v. Hughes,* 2 Ark., 452; *Forbes v. Adams,* 9 Sim., 462; Snell's Eq., 163, 164. But all this has been greatly modified and the procedure made more simple and sensible by enlightened modern legislation.

Reconversion sometimes takes place by operation of law. This occurs when a fund directed or covenanted to be laid out in real estate comes into the hands of the person for whose benefit the purchase is to be made, and in whom the entire right is vested, and he dies without making any declaration of his intention. The fund is then said to be "at home," and "being in the hands of one without any other use, but for himself, it will be money, and the heir cannot claim."

There is some analogy between the equity of a creditor to subject the interest of his debtor who is entitled to a part of the proceeds of sale in the case of a conversion and that of a creditor to enforce his claim against a debtor having only a "right in equity," in respect of land, instead of an equitable interest or estate therein, as in *Nelson v. Hughes,* 55 N. C., 33, where the Court held, by *Pearson, J.,* that the mere right to have one person declared a trustee for another could not be sold under execution, the remedy being in equity alone. The Court said, at p. 59: "But it is asked, How are creditors to subject these 'rights' of debtors to the payment of their debts? The reply is, as was said in *Page v. Goodman,* 43 N. C., 16; *Thigpen v. Pitt,* 54 N. C., 49, and many other cases: The creditors may have relief by filing a bill in equity to have the interest of their debtors declared and sold under a decree." In our case the entire land would have to be sold according to the direction of the will, and the debtor's share applied to the satisfaction of the claim, subject to his right of exemption in personal property.

The will in this case gives a life estate in the land to the mother, and an estate, by way of remainder, to the children and grandchildren after her death, when it is to be sold and the money divided as directed. Under this provision of the will the conversion will not take place until the life estate has been determined by the death of Mrs. Clifton. The creditor of one of the legatees is as much bound by the terms of the will as the legatee would be had there been no debt, and can only subject to the payment of his claims the interest of his debtor. They both must take, if at all, *per forman doni* (according to the form of the gift), and the mere fact that one of the beneficiaries has become indebted does not alter the rights of the parties under the will. As the testator directed a sale of the land after the death of his widow, the equitable conversion of the land into money will take place at that time. "When there is an imperative direction to sell, unless the conversion is expressly directed to be made at a specific time in the future, or upon the happening of

some particular event, the conversion takes place as from the
(617) death of the testator. 9 Cyc., 839. In this case the time for the conversion to take place is distinctly specified, viz., at the death of the widow, which is sure to happen sooner or later, and the conversion will therefore take place only at that time. It is said in 9 Cyc., 838, that there is some conflict upon this question between the cases, but this Court is placed among those which have adopted the rule stated above. *Brothers v. Cartwright,* 55 N. C., 113; *Powell v. Powell,* 41 N. C., 50.

But if the conversion took place from the testator's death, according to the majority rule, we think there would be no practical difference in this case, for the sale, under the direction of the will, could not be made until the time for it as fixed by the will had arrived. In the meantime the naked legal title is vested in the devisees named, as it would have been in the heirs by descent if there had been no devise to them. *Ferebee v. Proctor,* 19 N. C., 439, 446. That case holds that "nothing can defeat the heir but a valid disposition to another. Whatever is not given away to some person must descend. The heir takes, not by the bounty of the testator, but by force of the law, even against the express declaration of the testator to the contrary. If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his name had been inserted in it as devisee. But, in the meantime, the land descends, and the estate is in the heir. The power is not the state, but only an authority over it, and a legal capacity to convey it. These are elementary maxims." But this title by devise or descent is held in trust only for the purpose of eventually executing the intention of the testator that the land should be sold and the proceeds of sale divided among the beneficiaries named in the will as directed therein, so that they will take the property as personalty, and not as land. *Ferebee v. Proctor, supra,* illustrates this principle. There the executor had but a bare power to sell, not coupled with any interest, and the land which was not devised to him with the power descended to the heirs, and upon the execution of the power it passed from them to the purchaser at the sale.

It is not an interest in land which is subject to sale under the provisions of our statute. Revisal, secs. 629 and 630. The heir or devisee has but the naked legal title, and no beneficial interest in the land out of which his creditor could realize anything, and it would be vain and idle to sell it, and for that reason our statute does not provide for its sale. The heir or devisee does not hold the land in trust for the party entitled to the proceeds of sale under the direction for conversion, in the sense that the latter has any equitable estate in the land which would have a salable value, but the legal title is left in the devisee or heir, as it cannot be suspended until the conversion takes place, when

it automatically passes to the purchaser at the sale. This being so, the creditor of a party entitled to the proceeds of sale, or a part thereof, cannot levy or sell the land, as land, as his debtor has no (618) beneficial interest therein, because he takes it as personalty, nor can he *now* proceed in equity, nor until the conversion takes place at the death of the tenant for life, according to the will of the testator and the form of the gift. If the conversion had taken place as from the death of the testator, according to the majority rule, the actual conversion by a sale of the land could not have been made until after the death of the widow, as that is the time fixed by the will for the land to be sold. The testator had the right to annex any lawful condition to his gift and to prescribe the manner and time of its enjoyment.

The result is that the court erred in its judgment directing a sale of the land by the sheriff. His levy, sale, and deed to the purchaser are all void and of no effect, and will be so declared, and further, the deed will be set aside and properly canceled, so as to remove any cloud from the title and to untrammel the regular conversion of the land as directed in the will. It will be further declared that the defendant A. L. Owens is not now entitled to have a sale of the land for the purpose of its conversion into money under the will, and the subjection of plaintiff's share thereof to his claim, but this will be done without prejudice to his right to proceed hereafter, and at the proper time, to enforce his equity. There was error in the judgment of the court.

Reversed.

Cited: Broadhurst v. Mewborn, 171 N. C. 403 (4f); *Barbee v. Penny,* 172 N. C. 656 (4f); *Mewborn v. Moseley,* 177 N. C. 112 (4f); *McIver v. McKinney,* 184 N. C. 397 (4f); *Powell v. Timber Corp.,* 193 N. C. 796 (4f); *In re Phipps,* 202 N. C. 645 (2g); *Seagle v. Harris,* 214 N. C. 342 (4f).

AGNES SEAGRAVES v. CITY OF WINSTON AND CRAWFORD PLUMBING COMPANY.

(Filed 12 January, 1916.)

1. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligence—Constructive Knowledge.

In an action against a city and another for damages for a personal injury there was evidence tending to show that the codefendant, a plumbing company, under a permit of the city to make sewer connections for an owner adjoining the street, left an excavation across a much frequented sidewalk 2 to 2½ feet deep, unlighted and without guard, into which the

plaintiff, while going along the sidewalk on 31 December, about 6:30 or 7 p.m., fell and was injured. *Held*, sufficient upon the question of the defendant city's actionable negligence in failing to have the place properly lighted or safeguarded; and also, under the circumstances, to give the city ample constructive and previous knowledge of the existence of the defect.

2. Trials—Negligence—Instructions—Municipal Corporations—Streets and Sidewalks—Appeal and Error.

The defendant plumbing company, in connecting sewerage for a private owner with the system of the city, made a ditch 2 to 2½ feet deep, about 23 December, across a much frequented sidewalk, into which the plaintiff fell and was injured about 6:30 or 7 p.m. on 31 December following. The defendant requested the court to charge the jury that if it filled in and well tamped the hole on the day it was dug, and it did not exist until noon of the 31st, it would not be guilty of actionable negligence. *Held*, the prayer was properly refused, as it excluded the inference, under the evidence, that its hands should have discovered and protected the place on the 31st while at work there, or that the ditch had been negligently dug, thus causing the cave-in.

(619) APPEAL by defendants from *Devin, J.*, at February Term, 1915, of FORSYTH.

Civil action. There was evidence on part of plaintiffs tending to show that, on 31 December, 1912, about 6:30 to 7 o'clock p. m., as she was returning to her home along East Fourth Street of the city of Winston, between Hickory and Maple streets and in the vicinity of Lloyd's store, she fell into an excavation or hole in the sidewalk of said street, same being unlighted and not in any way safeguarded, and received serious and painful injuries, and, further, that the excavation or hole had been made by the Crawford Plumbing Company, engaged at the time in connecting the house of Mr. W. H. Black with the sewerage system of the city, and that this was being done under regular permit issued by the city authorities vested by law with supervision and control of such matters.

There was denial of liability by defendants, and it was claimed by the city that, if any excavation existed in that locality, the city had neither actual nor constructive notice of same and were in no way chargeable with negligence concerning it.

The action was originally instituted against the city alone.

Plaintiff recovered a judgment and, on appeal, a new trial was granted, the Court holding that, on the record as it then appeared, the case had been submitted to the jury under an aspect of liability that there was no evidence to support. See case, 167 N. C., 206. This opinion having been certified down, the Crawford Plumbing Company, the contractor doing the work, was made codefendant, another trial was had, and, on the usual issues in such cases, of negligence, contributory

negligence, and damages, there was verdict against both defendants. Judgment on the verdict, and defendants excepted and appealed.

Louis M. Swink and Fred M. Parrish for plaintiff.
Manly, Hendren & Womble for city of Winston-Salem.
Jones & Patterson for Plumbing and Supply Company.

HOKE, J., after stating the case: On the record as now constituted there are facts in evidence tending to show that the defect complained of and causing the injury was an excavation across the sidewalk, 2 to 2½ feet in depth, made and so left when the work was being done under permit of the city authorities and under circumstances re- (620) quiring the city to see that it was properly protected.

If these facts are accepted by the jury, it was a clear breach of duty on the part of the city in failing to have the place properly lighted or in some way safeguarded, and the motion to nonsuit, the position chiefly urged for error on the part of the city, appellant, cannot be sustained. *Carrick v. Power Co.*, 157 N. C., pp. 378-380; *Bailey v. Winston*, 157 N. C., 252; *Kinsey v. Kinston*, 145 N. C., 106.

In *Kinsey v. Kinston*, a case very similar to that presented in this aspect of the evidence, it was held: "It is the positive duty of municipal authorities to keep the public streets in a reasonably safe condition for the use of pedestrians. The city is liable in damages to the plaintiff, who, being accustomed to use its sidewalks in going to and from her work, passed in the morning, and, repassing in the evening, about 8 o'clock, was injured by falling into a ditch which had been dug across the sidewalk in the intervening time by a contractor for a private person, with notice to and permission of the city, and left without lights, warning signals, or signs at, near, or upon the ditch." And in *Carrick's case* the general principle applicable is stated as follows: "The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, whether the work is being done by a licensee or by an independent contractor. *Bailey v. Winston, ante*, 252, and authorities cited, more especially *Bennett v. Mount Vernon*, 124 Iowa, 537; *Brusso v. City of Buffalo*, 90 N. Y., 697, and see an instructive case on this subject, *City of Baltimore v. O'Donnell*, 53 Md., 110."

Again, there was evidence on the part of plaintiff tending to show that the excavation in question, in a much frequented sidewalk on a prominent street of the city, had existed for a sufficient length of time

to charge the city with constructive notice under the principles declared and sustained in *Bailey v. Winston, supra; Fitzgerald v. Concord,* 140 N. C., 110, and other cases of like kind.

In *Bailey v. Winston* the position is stated as follows: "A municipality owes it as an absolute duty to put its streets and highways in passable condition and to keep them so by the exercise of reasonable and continuing care and supervision for the safe use of pedestrians thereon.

"5. The ordinary liability of a municipality to a pedestrian injured by negligent defects in its streets or sidewalks depends upon whether the municipality had actual notice of the defect, or notice implied from the circumstances, as where the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision."

(621) And there was evidence further permitting the inference that the city department having more especial supervision of work of this character had actual notice that there was a hole in the sidewalk in that vicinity which needed to be looked after.

In no event, therefore, could defendant's motion for nonsuit have been sustained, and, on careful perusal of the record, we find no other objection which gives defendants or either of them any just ground of complaint.

It was urged for error on the part of the Crawford Plumbing Company that the court refused to give the following prayer for instructions: "That if the jury should find from the evidence that the Crawford Plumbing and Mill Supply Company dug a ditch across East Fourth Street in front of the house of W. H. Black in order to connect the house of said Black with the sewer line of said city on 22 or 23 December, 1912, and that the hole was filled by the defendant on the day on which it was dug, and the dirt of the same well tamped, and that on 31 December, 1912, the said defendant Crawford Plumbing and Mill Supply Company dug a ditch in the yard of W. H. Black, and should further find that no hole existed in the street until noon of 31 December, 1912, that in that case the defendant Crawford Plumbing and Mill Supply Company would not be guilty of negligence, and they should answer the issue of negligence as to it 'No.' "

The prayer could not have been properly given as presented. There was evidence coming from defendant's witnesses that they were then extending the ditch through the yard of Mr. Black on the afternoon of 31 December, and later than noon, the time fixed in the prayer, having finished the part of the ditch across the sidewalk some days before. If the hole in the sidewalk was caused by a cave-in while the hands were there, they should have discovered and protected it, and the prayer to entirely ignored the inference clearly permissible from the testimony,

that in the endeavor to extend the ditch through the yard they negligently dug and left it so that a cave-in on the sidewalk was not unlikely.

As a matter of fact, his Honor gave the prayer substantially as preferred except that he changed the time stated from noon till 6 or 7 o'clock p. m., the time when the company's hands had certainly quit work. In the prayer as given, his Honor also ignored the evidence tending to show that the company's hands may have been negligent in leaving the ditch in the yard, so that a cave-in from the sidewalk was not unlikely to occur.

There was no error, therefore, to defendant's prejudice in presenting this feature of the case to the jury.

There was practically no evidence tending to show contributory negligence, and in any event his Honor committed no error in submitting this issue to the jury's decision, which he did under the (622) principle recently approved by the Court in *Darden v. Plymouth,* 166 N. C., 492.

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

No error.

Cited: Michaux v. Rocky Mount, 193 N. C. 554 (1g); *Walker v. Light Co.,* 203 N. C. 803 (1g); *Haney v. Lincolnton,* 207 N. C. 286 (2g); *Radford v. Asheville,* 219 N. C. 190 (1g).

J. C. HERBERT ET AL. v. UNION DEVELOPMENT COMPANY.

(Filed 12 January, 1916.)

1. Appeal and Error—Objections and Exceptions—Scope of Objections.

Objections to the introduction of State grants in evidence in an action involving title to lands, upon the ground that they are not and do not purport to be grants or abstracts of grants, not having been signed by the Governor, cannot be enlarged on appeal so as to include an objection that they have not been properly registered. As to whether the objection in this case is aptly taken, *Quære.*

2. Deeds and Conveyances—Actions Commenced—Registration.

A party to an action involving title to lands may cause a proper registration to be made after the commencement of the action, and use it upon the trial.

APPEAL by defendants from *Ferguson, J.*, at Fall Term, 1915, of SWAIN.

This is an action brought for the purpose of determining the title to five several tracts of land embraced in State Grants Nos. 2865, 2866, 2867, 2868, and 2869, as described in the complaint, plaintiffs asserting ownership thereto as the children and heirs at law of one W. H. Herbert by descent and not by purchase.

The answer of the defendants denied the right of plaintiffs to recover the lands embraced in Grants Nos. 2865, 2866, 2868, and 2869, or any interest therein, and disclaimed any right or interest in and to the lands embraced in Grant No. 2867 unless the same or a part thereof should lap upon and be covered by sections Nos. 31 and 32 in District No. 13 of Macon County, denying the right of plaintiffs to recover so much of Grant 2867 as might be embraced within the boundaries of said section.

At the trial of the action the plaintiffs, for the purpose of showing title in themselves, offered certified copies of certain records from the office of the Secretary of State, said copies having been certified in one paper by the Secretary of State and being in words and figures as follows:

No. 2865.

STATE OF NORTH CAROLINA

E. HERBERT.

Know ye that we have granted unto William Herbert of Cherokee County 640 acres of land on the waters of Nantigalee River, on the west side, beginning at a white oak on a ridge S. E. of the Tate
(623) Branch and nearly S. of its mouth, running N. 55 E. three hundred and twenty poles to a stake; thence S. 35 E. two hundred and thirty-three poles to a stake; then S. 55 W. four hundred and forty poles to a stake; then N. 35 W. two hundred and thirty-three poles to a stake, then N. 55 E. one hundred and twenty poles to the beginning. Entered the 20th day of March, 1859.

To hold, the said W. E. Herbert, his heirs and assigns forever.

Dated 25 April, 1865.

Corrected by virtue of authority given by Laws of 1889, ch. 460. This 20th day of April, 1891. OCT. COKE,

Sec. State.

I, J. Bryan Grimes, Secretary of State of North Carolina, do hereby certify the foregoing and attached five sheets to be true copies from the records of this office.

In witness whereof I have hereunto set my hand and affixed my official seal.

Done at Raleigh, this 5 September, 1908.

(Signed) J. BRYAN GRIMES,
Secretary of State.

(Official Seal.)

Only one of the papers is copied, as all are alike.

The defendant objected to the introduction in evidence of said copies from the office of the Secretary of State, and each of them, upon the grounds that they are not and do not purport to be grants or abstracts of grants, not having been signed by the Governor, not having been countersigned by the Secretary of State, and not having the Great Seal of the State affixed, and, further, that they do not recite or purport to recite or in any manner indicate that they were signed by the Governor, countersigned by the Secretary of State, or attested by the Great Seal of the State.

Objection sustained, and plaintiff excepted.

The plaintiffs, for the purpose of showing title in themselves, offered in evidence certain records from the office of the register of deeds of Clay County. Said records being found respectively in Book "F," at page 511, Book "F," page 512, and at Book "F," page 483, of the records of Clay County, and being in words and figures as follows:

No. 2865.

STATE OF NORTH CAROLINA.

Know ye that we have granted unto W. E. Herbert, of Cherokee County, 640 acres of land on the waters of Nantigalee River, on the west side, beginning at a white oak on a ridge S.E. of the Tate Branch and nearly S. of its mouth, running N. 55 E. three hundred and twenty poles to a stake; thence S. 35 E. two hundred and thirty poles to a stake; thence S. 55 W. four hundred and forty poles to a stake; (624) then N. 35 W. two hundred and thirty-three poles to a stake; then N. 55 E. one hundred and twenty poles to the beginning. Entered the 20th day of March, 1859. To hold, to the said W. E. Herbert, his heirs and assigns, forever.

Dated 25 April, 1865.

Corrected by virtue of authority given by Laws of 1889, ch. 460. This 20th day of April, 1891.

OCT. COKE,
Sec. State.

STATE OF NORTH CAROLINA—DEPARTMENT OF STATE.

RALEIGH, July 11, 1869.

I, Henry J. Menninger, Secretary of State, do hereby certify that the foregoing is a true copy of the record on file in this office.

Given under my hand the day and date above written.

H. J. MENNINGER,
Secretary of State.

Only one of these papers copied, as they are all alike.

Defendant objected to the introduction of the foregoing records, and each of them, for the reasons that while purporting to be copies of certain records from the office of the Secretary of State, they are not certified as being such by the Secretary of State in the manner and form prescribed by law to entitle them to registration, in that the purported certificate of the Secretary of State attached thereto and upon which he purported registration was had is not authenticated by the seal of the Secretary's office, and the said certificate not reciting that they were authenticated by a seal, and no seal being indicated thereupon; and for the further reason that said records are not and do not purport to be grants or the abstracts of grants, in that they are not signed by the Governor, countersigned by the Secretary of State, or in any manner purporting to be under the Great Seal of the State. Neither do they profess in any way to have been signed by the Governor, countersigned by the Secretary of State, or sealed with the Great Seal of the State.

The court sustained the objection of the defendants, and the plaintiff excepted.

The objections of the defendants to the certified copies from the office of the Secretary of State, and to the records of Clay County, having been sustained by the court as above indicated, and the plaintiff having excepted in each instance to said ruling, in deference to the ruling of the court upon the objections made by the defendant, plaintiffs submitted to a nonsuit and appealed to the Supreme Court.

J. D. Murphy and Zebulon Weaver for plaintiffs.

Lindsay, Young & Donaldson, Johnston & Horne, and Bryson & Black for defendants.

(625) ALLEN, J. The copies of the papers relied on by the plaintiff as grants from the State, duly certified by the present Secretary of State, are not objected to upon the ground that they have not been registered, and the rule generally prevails in appellate courts that the ground of objection cannot be enlarged upon appeal. 3 Corpus Juris, 747.

Confining ourselves, therefore, to the objection as stated, the question has been fully considered and decided against the defendants, at this term, in *Howell v. Hurley, ante,* 401.

We are inclined to the opinion that the record from the office of the register of deeds, made on the authority of the certificate of Menninger, Secretary of State, was properly excluded, but it is not necessary to decide this question, as a new trial must be ordered for error already pointed out, and if the papers have not since been registered on the new certificate this can be done before another trial is had.

The case of *Morehead v. Hall,* 132 N. C., 122, has created the impression that a plaintiff cannot register his title after the commencement of the action and use it upon the trial; but that case is founded upon the fact that the grant offered in evidence *could not be registered under the laws in force at the commencement of the action.*

In the subsequent case of *Brown v. Hutchinson,* 155 N. C., 208, it was held that a plaintiff may register his title after the commencement of the action, and the case of *Morehead v. Hall* is there commented on and distinguished.

The judgment of nonsuit is set aside and a new trial ordered.

New trial.

Cited: Pennell v. Brookshire, 193 N. C. 75 (2f).

TALLASSEE POWER COMPANY v. C. W. SAVAGE ET AL.

(Filed 12 January, 1916.)

1. Deeds and Conveyances—Boundaries—Trials—Matters of Law—Questions for Jury.

What are the termini or boundaries of a tract of land given in a grant or deed is matter of law for the court, and the location thereof is a matter of fact for the jury.

2. Deeds and Conveyances — Calls — Natural Boundaries — Ascertained Lines.

A call in a grant or deed for a natural object which is unique and has properties peculiar to itself will control when the course and distance given are at variance with it; but where the call is along an ascertained line or natural boundary to a known or established terminus or corner, and said line or boundary will not reach the designated point, the usual rule is to run the line to the point nearest to the corner called for, and then in a direct line to such corner.

3. Same—Rivers—Conflicting Calls—Interpretation—Straight Lines.

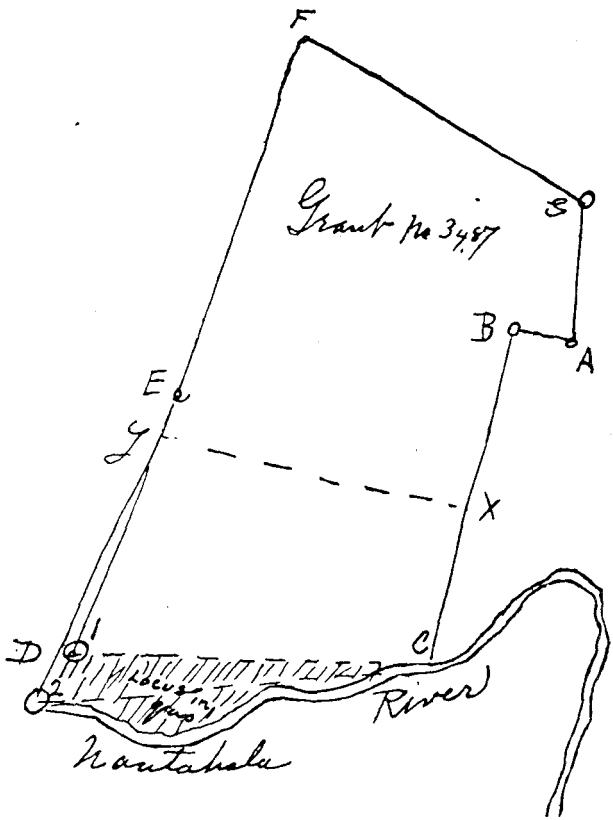
Where the location of the true divisional line in dispute between two adjoining owners is made to depend upon calls for an unsurveyed line from one established corner to another, as follows: "thence S. 83 W. 206

poles down the river to a spruce pine on the cliff," and it appears that the river takes a winding course in the general direction indicated, but the pine is 100 yards from the near side of its bank, the court will give effect to both descriptions, as nearly as possible, by establishing the line down the various windings of the river to a point opposite the established corner, the spruce pine, and thence thereto in a direct line.

CLARK, C. J., dissenting.

(626) APPEAL by defendants from *Cline, J.*, at Spring Term, 1915, of MACON.

Civil action to try the title to a tract of land situate in Macon County on or near the Nantahala River, and at the trial it was admitted that



the defendant owned the southern part of the land covered by Grant No. 3487, approximately the portion below the tentative line Y, and that plaintiff owned the land adjoining and up to the line of said grant. By

reason of these agreements, the title to the part of the land in dispute was properly made to depend on the correct location of (627) the southern line of said grant, plaintiff contending that the true location was a straight line from C to 1, and defendants that it ran from C with the courses of the river to 2.

The descriptive calls of the grant in question are as follows: "Beginning at a Spanish oak on the east face of Grindstone Knob, at or near N. S. Jarrett's line (A), runs N. 70 W. 30 poles to a white oak (B); thence S. 10 W. 208 poles to a spruce pine on the river (C); thence S. 83 W. 260 poles down the river to a spruce pine on the cliff (1 or 2); thence N. 30 E. 190 poles to a chestnut, near W. Wilson's house (E); then N. 21 E. 180 poles to a maple in Mason's line (F); thence S. 65 E. 180 poles to a hickory, Mason's and Wilson's corner (9); thence to the beginning.

There was evidence tending to show that the point C was on the river and that the line from C "down the river" was not run or marked when the survey and entry were made or grant taken out, and much testimony tending to show that the terminal point of this line was at (1), as contended for by plaintiff, same being on a cliff, 100 yards from the river, and also evidence for defendant tending to show that the true location of this terminal point was on the river at (2).

The annexed plat will be of assistance in explaining the position of the respective parties.

An issue was submitted and answered by the jury as follows:

"Q. Is the true location of the southwest corner of Grant No. 3487 at the point on the court map marked 'Hemlock Stump' (fig. 1), as contended for by plaintiff? Answer: Yes."

On the verdict, there was judgment for plaintiff, and defendants excepted and appealed.

H. B. Lindsey, F. S. Johnston and Bryson & Black for plaintiff.

J. Frank Ray, H. G. Robertson and Councill & Yount for defendants.

HOKE, J., after stating the case: Among the established rules governing the law of boundary in this State, it has been held:

a. That what are the termini or boundaries of a tract of land, a grant, or deed, is a matter of law; where these termini are is a matter of fact. The court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance also given, the former are the termini and the latter merely points or guides to it, and, therefore, when the natural object called for is unique or has properties peculiar to itself, course and distance are disregarded, but where there are several natural objects

equally answering the description, course and distance may be examined to ascertain which is the true object, for in such case they do not control a natural boundary, but only serve to explain a latent ambiguity. (628) This position was so stated by *Henderson, J.*, delivering the opinion in *Tatem & Baxter v. Paine & Sawyer,* 11 N. C., 64, and has been approved and upheld in numerous decisions of the Court. *Lumber Co. v. Bernhardt,* 162 N. C., 460, 464; *Lumber Co. v. Hutton,* 152 N. C., 537; 159 N. C., 445; *Sherod v. Battle,* 154 N. C., 346; *Mitchell v. Welborn,* 149 N. C., 347; *Whitaker v. Cover,* 140 N. C., 280; *Bonapart v. Carter,* 106 N. C., 534; *Com. v. McCrary,* 48 N. C., 496, and many other cases.

b. Where a call of a grant or deed is along an ascertained line or natural boundary to a known or established terminus or corner, and said line or natural boundary will not reach the designated point, the usual rule for locating such a description is to run the line of the description as far as it will go, or to the nearest point to the corner called for, and then a direct line to such corner. The case of *Shultz v. Young,* 25 N. C., 385, is in illustration of the position, and the general principle was approved in the recent case of *Boyden v. Hagaman,* 169 N. C., 204.

In *Shultz's case* it was held: "Where part of the description of the boundary of a tract of land, contained in a grant, was from a certain point 'south with A.B.'s line 310 poles to C.D.'s old corner,' and A.B.'s line did not reach C.D.'s corner, nor run in the direction towards it, but at the expiration of the 310 poles on A.B.'s line you had to run nearly at right angles to arrive at C. D.'s corner: *Held,* that you must run on A.B.'s line 310 poles and then a straight line to C.D.'s corner, as by doing so you would best conform to the whole description of the deed, though you would run two lines instead of one called for." And *Gaston, J.,* delivering the opinion, among other things, said: *"Prima facie* a call in a grant for one terminus to another is understood to mean a direct line from the former to the latter point. But assuredly there may be accompanying words of description which will indicate that the line is not to be a direct line. Thus it is of ordinary occurrence that when the call is with a river or creek from one terminus to another, the river or creek, however crooked its direction or numerous its courses if it will carry you to the proposed terminus, must be followed throughout. Nor could there be any difficulty in holding that if the call were for a county line or the line of another tract, or a marked line, such line, however sinuous or indirect, if it ended at the terminus called for, must be faithfully followed. In these cases, and cases like these, the whole of the description of the thing granted is obviously consistent, and every part of it by this construction receives its full effect. You go from one terminus to another, and you go by the guide which you are

directed to follow. But when the terminus cannot be reached merely by following the mode pointed out in the description, the question occurs, Shall this mode be wholly disregarded or shall it be observed so far as it is represented as leading to the terminus, and then to be relinquished for a direct line to the terminus? Herein it appears that the law distinguishes between the degrees of certainty which different de- (629) scriptions hold forth. If the description be one by course and distance only, it is clear that such description is disregarded, and the line is in law a direct line from one point to the other. But if it be by permanent natural boundary, then the description is regarded as sufficiently certain to require that it should be respected, and the line must pursue that description so far as it conducts towards the terminus. This is fully established in *Sandifer v. Foster,* 1 Hay., 237, which is always referred to as a leading authority on the question of boundary."

c. Again, it is the recognized position "That in determining the boundary of land none of the calls must be disregarded when they can be fulfilled by any reasonable way of running the line, which will be defeated only when necessary to give effect to the intent of the parties as expressed in the instrument; a position upheld in *Bowen v. Lumber Co.,* 153 N. C., 366; *Miller v. Bryan,* 86 N. C., 167; *Clark v. Wagner,* 76 N. C., 463; *Long v. Long,* 73 N. C., 370; *Shultz's case, supra.*

Referring again to the last case, *Judge Gaston,* speaking to the rule, said: "Now, independently of the peculiar respect which natural boundaries command with us, this decision is proper on general principles. By following the line referred to in the description, so far as it leads towards the terminus or is expressly directed, the call for the terminus is not disregarded. The terminus is still reached, though not reached by the direct line which would have been presumed to be intended had that call been the only description. But by running a direct line to the terminus, a part of the description, which is perfectly intelligible and which was assuredly designed to aid in ascertaining the thing granted, is wholly rejected. It is a leading rule in the construction of all instruments that effect should be given to every part thereof; and in expounding the descriptions in a deed or grant of the subject-matter thereof they ought all to be reconciled, if possible, and as far as possible. If they cannot stand together, and one indicate the thing granted with superior certainty, the other may be disregarded as a mistaken reference. But so long and so far as they may stand together, each of them may be considered as declaring the intent of the parties."

In further illustration of these principles, and on facts more directly relevant to the case presented in the record, it has been several times held in this State, and the position is in accord with authoritative decisions elsewhere, that where a call of a deed is from an ascertained or

fixed point on a natural water-course, a river or well defined creek or swamp, "thence up or down the same," the correct method of location, as a general rule, is that the line follows the stream to next point called for, if the same is placed on the stream. *McPhaul v. Gilchrist,* 29 N. C., 169; *Rogers v. Mabe,* 15 N. C., pp. 180-194; *Smith v. Auldridge,* 3 N. C., 382; *Hartsfield v. Westbrook,* 2 N. C., 258; *Brown v.*
(630) *Huger,* 62 U. S., pp. 305-320-321. Or if near it and the stream, to the nearest point and then to the corner indicated.

In *Rogers v. Mabe* the call was "thence west up the river to a stake," and it was held that the line must pursue the course of the stream, and *Ruffin, C. J.,* speaking to the question, said: "The Court considers it settled upon authority that up the river is the same as along the river, unless there be something else beside course and distance to control it. In *Hartsfield v. Westbrook,* 2 N. C., 258, 'thence down the swamp' was held to mean along the swamp. In that case no course was given, and for that reason the argument was that a direct line from the corners called for in the deed was the boundary; but it was held otherwise. But in *Smith v. Auldridge,* 3 N. C., 382, the description was, 'thence 50 degrees east, down the creek to a whiteoak,' and the question was whether a straight line from the white oak to the preceding corner was the boundary, and it was held the former. We believe these cases have since governed many others," etc.

In *Hartsfield v. Westbrook,* on a call from a poplar in a swamp thence down the swamp to the beginning, held that the swamp and not a straight line from the poplar to the beginning is the boundary.

In *Brown v. Huger, supra,* the Court, speaking to this question, said: "The citation from the treatise by Angell on Water-Courses fully declares the rule to be that where a line is described as running in a certain direction to a river, and thence up or down with the river, those words imply that the line is to follow the river according to its meanderings and turnings, and in water-courses not navigable must be *ad medium filum aquæ.*" Upon a question of boundary, in the case of *Jackson v. Low* in the 12th of Johnson's Reports, 255, in ejectment, the Court, in construing a provision in a deed in these words, "leading to the creek, and thence up the same to the southwest corner of a lot," etc., say: "There can be no doubt but this lot must follow the creek upon one of its banks or through the middle. This description can never be satisfied by a straight line. The terms 'up the same' necessarily imply that it is to follow the creek according to its windings and turnings, and that must be the middle or center of it."

It is true that in the case of *Rogers v. Mabe, Ruffin, C. J.,* after stating the general rule to be that "up the river" is the same as "along the river," proceeds as follows: "These words might possibly be con-

trolled by the call in the grant for a line of marked trees or a visible and permanent marked corner, as a stone or tree marked and identified and not standing on the river, as that might show they were used only to denote the general direction of the line," etc.

While this addenda, made only by way of suggestion and in very hesitant language, might, in exceptional cases, be allowed to prevail where a line of trees, as shown, marked, identified, and called for, and necessarily drawing the boundary away from the river, the (631) suggestion may not be held for law where the line was not run or marked, and the only diverting fact is the existence of a corner standing away from the stream and not over a hundred yards from it.

The testimony here shows that the land along the river was steep mountain-side, very rugged, and the line was never run. The disputed corner was placed on a cliff, about a hundred yards out from the river, established by the jury at (1), and we find nothing to show that the course called for in the grant would have reached this corner. It is extremely probable, from a perusal of the testimony, that it was only intended to indicate the general course of the stream at the point of departure, and so far as the course is concerned, the call seems to be without significance one way or the other on the true location of the disputed line.

Under the conditions presented, a proper application of the principles stated is, in our opinion, against the conclusion of the court, and, on the facts admitted in the record, and established by the verdict, there should be a verdict entered in favor of defendant. The call being from a known point on the river, "thence S. 83 W. 260 poles down the river to a spruce pine on a cliff," this pine having been fixed by the jury at (1), the correct method of locating the grant is to run with the river to a point opposite (1), and thence a direct course to the pine at (1), inclosing the land in dispute. Such a position gives full recognition of the preference which the law ordinarily gives to natural objects. It takes account of all the calls of the grant which are ascertained and established, and reaches the corner as established by the jury, according to the rule approved in *Boyden v. Hagaman, Shultz v. Young,* and other cases.

There is nothing in the opinion of *Bonapart v. Carter,* 106 N. C., 534, that in any way militates against the disposition made of the present appeal. In *Bonapart's case,* on a call "Beginning on the side of Gallon Creek at a small oak, corner of John Edwards," the Court held that it was open to defendants to show that the beginning corner referred to, a small oak, John Edwards' corner, was 300 yards from the creek, the present *Chief Justice* laying down the rule that the reference to the creek was not a call of the boundary, but merely a description of

the locality of the beginning point, definitely described as "a small oak, John Edwards' corner." And the same principle was more recently applied in *Lumber Co. v. Lumber Co.*, 169 N. C., 83, *Associate Justice Walker* delivering the opinion.

For the reasons stated, we are of opinion there was error in the judgment as rendered, and that the same must be

Reversed.

(632) CLARK C. J., dissenting: The call in this case, "thence S. 83 W. 260 poles down the river to a spruce pine on a cliff," is clear and unambiguous. This pine has been fixed by the jury at a point on the cliff 118 yards from the river bank.

The words "down the river" do not mean "with" the river, which bends and meanders. If those words were to control course and distance, the pine on the cliff would not be reached. The cardinal principle is that the more certain direction should be followed, *Baxter v. Wilson*, 95 N. C., 137, to wit, the line should follow the course, "S 83 W.," and the distance, "260 poles," to the "spruce pine of the cliff" which the jury have fixed. Following this course and distance to the identified pine, the directions of the deed would be obeyed in every particular; whereas, to follow the meanderings of the river is in contradiction of the course as given and would not tally with the distance specified and would not reach the corner named. The words "down the river" were not meant to overthrow and disregard course and distance, but merely to indicate that the direction was "down the river" and not up the river. Besides, to substitute the river as a boundary when it is not called for would not only change the course and lengthen the distance, but would require the creation by the Court of a new line from some indefinite and arbitrary point on the river bank, "118 yards to the spruce pine of the cliff."

The course and distance and the general direction and the spruce pine on the cliff, being the more certain description, should be followed, and we should not substitute for it the meanderings of the river with changing courses and a longer distance and calling for the intercalation of a new line from an uncertain point on the river to the identified corner, "at the spruce pine on the cliff."

It was in evidence, and not controverted, but adopted as true by both parties, that the corner on the spruce pine at "C," and at the spruce pine on the cliff at fig. 1, were established and marked as such by the survey of the entry upon which Grant No. 3487 was issued, but that the line between these points were not actually run. Beginning at C, the call is "then S. 83 W. 260 poles down the river to a spruce pine on a cliff." Both spruce pines and the cliff are identified and called

for. Then the boundary is indicated by course and distance, "S. 83 W. 260 poles." The river is not called for as a boundary, and the line does not specify "with" the river, but merely that the course and distance and the spruce pine on the cliff are in the direction of "down the river."

In *Graybeal v. Powers,* 76 N. C., 71, the Court lays down the rule: "Where two corners are established, and the course and distance will not connect them, then the line between them must be run straight, making as small departure as may be from the course and distance called for in the grant." This rule has been repeatedly approved, and (633) as late as *Lumber Co. v. Bernhardt,* 162 N. C., 466.

The learned judge followed this rule, and he is supported also by all the evidence in this case. It appears that the plat of the survey upon which the grant was issued has a straight line running from the spruce pine at C to the spruce pine on the cliff at fig. 1. The course of the river is not a straight line. The plats have always been held competent evidence, and they are now expressly made so by Revisal, 1596. The witness Wilson testified that the line between the two spruce pines was not run, but that the two spruce pine corners were established and marked at the corners, and that a straight line from one spruce pine to the other would cut twice across the river, which here makes a bend, and the surveyor said that the enterer wanted the falls and a straight line between the two corners so as to cross the river and get the falls if he could; that his idea was to run a *straight line* between the two spruce pines, as that would cross the river, which he wanted to do if he could. He is corroborated by the entry plat, which shows a straight line.

In *Sandifer v. Foster,* 2 N. C., 237, the call was "thence S. to a white oak, thence along the river." In *Whitaker v. Cover,* 140 N. C., 280, and the cases cited therein, the calls were "along" the line of another tract, "thence with the river," "with the course of the swamp," etc. These are very different from this case. Here there is no call "along the river" nor "with the river" nor "with the meanderings of the river," but there is a straight line called for between two spruce pines which is platted on the survey attached to the grant as a straight line, and there is the declaration of the surveyor that the enterer desired a straight line in order that he could cross the river so as to get the falls, and the further fact that the lower corner is not on the river, but some distance from it. In *Rogers v. Mabe,* 15 N. C., 180, the call was "up the river to a stake." There being neither fixed corner nor course and distance (as in this case), the Court held it meant "along the river," of course.

It would seem that the finding of the jury and the charge of the court are in accordance with the law and the evidence.

Cited: Millard v. Smathers, 175 N. C. 60 (3g); *Brown v. Smathers,* 188 N. C. 176 (2g); *Geddie v. Williams,* 189 N. C. 337 (1f); *Rose v. Franklin,* 216 N. C. 291 (1f); *Clegg v. Canady,* 217 N. C. 435 (2f).

(634)

W. J. HANNAH, TRUSTEE, ETC. v. R. A. L. HYATT ET AL.

(Filed 12 January, 1916.)

1. Clerks of Court—Receivers—Official Bonds—Sureties' Liability.

Where lands are ordered to be sold and the court appoints the clerk of the court by name and official capacity as such to sell and to receive and invest the proceeds, without requiring bond, the clerk acts officially in regard to such duties, and the sureties on his bond as clerk of the court are liable for his failure to properly discharge the duties of his trust.

2. Clerks of the Court—Receivers — Orders of Court — Disbursements—Credits.

Where the clerk of the Superior Court is ordered in his capacity as such to sell lands and invest and reinvest the proceeds, and makes payment of certain moneys under the further orders of the court, in pursuance of the management of the property, no personal liability attaches to the clerk in acting accordingly; and where it is established that such orders have been duly made, the failure to record them cannot prejudice him.

3. Appeal and Error—Reference—Exceptions.

Where a referee's conclusion of law upon the facts found by him has been overruled by the trial judge, and no exception thereto has been taken by the appellant, he may not be heard to complain on appeal.

4. Clerks of Court—Receivers—Orders of Court—Deposits—Interest.

Where the clerk, under order of court, sells certain lands, and deposits the proceeds with a bank which paid 5 per cent on accounts deposited for six months, but no interest on checking accounts, and it appears that the clerk was required to check on this account under the further orders of the court, but made a special arrangement with the bank whereby he was to receive 4 per cent on this deposit, which was the best he could do, he is not chargeable with the 5 per cent interest paid by the bank on its time deposits.

5. Same—Two Funds.

Where an officer of the court, ordered to sell land, deposit the proceeds in a bank at the largest rate of interest obtainable, has two funds so deposited, on one of which he can and on the other he cannot draw interest, and he is required to check on his account in the performance of his duties, which could have been done on either account, he is chargeable with the interest lost by his checking on the interest-bearing account.

6. Public Officers—Detaining Funds—Penalties—Interpretation of Statutes.

In an action to recover the 12 per cent allowed under Revisal, sec. 284, from the clerk of the court, etc., for money unlawfully detained, it is necessary that the plaintiff show some adequate default; and it appearing in this case that the parties agreed to a settlement, but that the plaintiff had refused to make a proper allowance for certain expenditures, the cause is sent back for further findings as to what had been done by the parties at the attempted settlement, the amount, if any, in defendant's hands and due the plaintiff, or whether a proper tender had been made and refused.

7. Clerks of Court—Receivers—Commissions—Appeal and Error, Remanding Case.

The clerk of the court being required to sell certain lands and invest the proceeds, etc., and it appearing that he had rendered services of value, with no indication of conversion, misapplication, or commingling of funds, it is held that he is entitled to his commissions in the settlement of the estate, though he is chargeable with certain interest that he may have received on the funds intrusted to him. Revisal, sec. 2773, relating to the commissions of the clerk, has no application to the facts of this case.

CIVIL ACTION heard by *Cline, J.*, upon exceptions to a referee's (635) report, at May Term, 1915, of HAYWOOD. Defendant appealed.

The defendant R. A. L. Hyatt was elected clerk of the Superior Court of Haywood County in November, 1906, and in the next month he duly qualified as such by giving his official bond, with W. T. Lee, R. Osborne, Allen Howell, Jr., and S. C. Welch, defendants, as sureties. S. C. Welch died on 18 December, 1912, and the other defendants, I. H. Way and J. C. Welch, are his executors. R. A. L. Hyatt continued in office, with the same bond and sureties, until 21 June, 1909, when he resigned, and R. E. Osborne was appointed his successor and was duly qualified, and J. R. Leatherwood became his successor by election of the people in 1910 and duly qualified.

At July Term, 1907, the court, in regular proceedings, ordered that part of the "Love Speculation Land" known as "Cold Mountain tract" to be sold, and further ordered that "R. A. L. Hyatt, clerk of Haywood County Superior Court, be and he is hereby appointed a commissioner of the court to make the sale," but there was no direction that he give a bond. The appointee was directed to pay to Hugh A. Love the sum of $1,034.83 from the proceeds and deposit the balance ($3,224.01) in the Bank of Waynesville and "take for the same a certificate of deposit, payable to said Hyatt, commissioner of the court, obtaining the best rate of interest for the same that can be obtained." This tract of land was conveyed by Hyatt, at the request of the purchaser, Hugh A. Love, by deed to J. F. Abel, for the consideration mentioned therein. The deed was drawn and executed in the name of "R. A. L. Hyatt, clerk of the

Superior Court of Haywood County and commissioner of the court," and the mortgage from Abel to secure the notes for deferred payments described him as "R. A. L. Hyatt, commissioner of the court."

At February Term, 1908, the court ordered a sale of another portion of said lands, known as the "Martin Tract," and appointed R. A. L. Hyatt to make the sale, in the following language: "It is considered, ordered, adjudged, and decreed by the court that R. A. L. Hyatt be and he is hereby constituted and appointed a commissioner of the court to make sale," etc., and the order required him to give bond in the sum of $1,500, conditioned to pay the proceeds of sale ($1,020) to such
(636) party or parties as he, the said R. A. L. Hyatt, may be directed, under and by orders of the court; and it was further directed that "the said sum be deposited in the bank and removed therefrom only by order of the court." That the bond for $1,500 was given and the land sold by Hyatt on 5 March, 1908, and a deed executed to James A. Martin, the purchaser, for the consideration of $1,020, the amount of his bid. This deed described Hyatt as follows: "R. A. L. Hyatt, commissioner of the court under a judgment of the Superior Court of Haywood County."

On 16 July, 1907, he deposited the amount paid to him by J. F. Abel ($4,258.83) in the Bank of Waynesville on open account, subject to check, in the name of "R. A. L. Hyatt, commissioner," and by special contract with the bank the deposit drew 4 per cent interest, and on 5 March, 1908, he deposited the amount received by him from James A. Martin in the Commercial Bank, on open account, subject to check, and without interest, the deposit having been made in the name of "R. A. L. Hyatt, commissioner." He collected interest to the amount of $123.57 from the Bank of Waynesville on the deposit in that bank. He checked out of the bank deposits divers sums under orders of the court, and among others he was directed to pay to one W. W. Stringfield $50 each month for services to be rendered "as agent for the Love estate," and gave checks to Stringfield for the said amount each month from 1 August, 1907, to 1 July, 1908; it being $550 in all.

At July Term, 1908, the presiding judge signed an order, in chambers, directing R. A. L. Hyatt to pay, until further ordered, from the funds of the Love estate to W. W. Stringfield the sum of $50 each and every month thereafter, for services rendered to said estate. This order was not entered on the minutes of the court nor was there any entry referring thereto, and the order has been lost. There has been no action of the court revoking said order. That, pursuant to said order, and acting in good faith thereunder, R. A. L. Hyatt paid to W. W. Stringfield by checks on the bank $50 each month from 4 August, 1908, to and including 1 June, 1909, making $550 in all, and on and after 29 July, 1911, he paid to W. J. Hannah, trustee, and administrator of the Love

estate, and plaintiff in this case, the $1,020 received by him from the sale of the Martin lands, and $980 received from the sale of the "Cold Mountain tract."

On 16 March, 1911, plaintiff demanded of R. A. L. Hyatt all funds in his possession, or which should be in his possession, belonging to the Love estate, and Hyatt failed to comply with the demand.

The case was referred to Mr. J. S. Bohannon to take evidence and state an account, with his conclusions of law, and he reported the same to the court. The material part of his findings are substantially stated above. As a conclusion of law he held that the defendant acted under the orders of the court in respect to the sale of the "Cold Mountain tract" and the proceeds of the sale thereof, not simply as commis- (637) sioner, but as clerk of the Superior Court, and that the sureties on his bond are liable for any default by him; but as to the Martin land, he was acting solely in the capacity of commissioner, and his sureties were not liable for any default by him in respect thereto; and the court, in passing upon the exceptions, affirmed these rulings. The referee concluded that the defendant R. A. L. Hyatt and his codefendants, his sureties, were indebted to the plaintiff W. J. Hannah, as trustee and administrator of the Love estate, in the sum of $1,553.16, with interest at the rate of 12 per cent on $1,110.72 from said date until paid, which principal sum included the last payments to W. W. Stringfield, under order of July Term, 1908, amounting in all to $550, and interest thereon. This ruling the court modified by striking from the conclusion of the referee the said amount of $550 and incidental items, and reduced the amount due to the sum of $682.46, with interest on $488.05 from 18 January, 1915, until paid, and adjudged that the costs of the suit be paid by the defendants. The referee charged defendants with 5 per cent interest to 16 March, 1911, on the clear deposit in the Bank of Waynesville, being $3,225.01, that is, $4,258.83, less $1,034.82, amount paid by Hyatt to Hugh A. Love, and 12 per cent interest on the same from 16 March, 1911, until it is paid; and this ruling was sustained by the judge, subject to a proper deduction of the Stringfield payments. The referee charged no interest on the $1,020 derived from a sale of the "Martin Tract," and this was approved by the judge.

Defendants duly excepted, and from the judgment appealed.

During the years 1907, 1908, and 1909, the Bank of Waynesville paid 5 per cent interest annually on all money deposited with it "on time certificates or certificates of deposit, and paid to R. A. L. Hyatt 4 per cent on his deposit of $4,258.83, and from 5 March, 1908, to 1 January, 1911, the Commercial Bank of Waynesville paid 5 per cent interest per annum on all money left with it" on time deposit or certificate of deposit, and which was allowed to remain in the bank for six months. That R. A. L.

Hyatt attempted to deposit the fund of $1,020 received from the Martin land with both banks at 4 per cent, but they refused to receive it and pay interest on it if it was subject to check as in the case of the $4,258.83 deposited with the Bank of Waynesville.

John M. Queen and W. J. Hannah for plaintiff.
M. Silver and J. W. Ferguson for defendant.

WALKER, J., after stating the case: There are five questions presented by the defendants' exceptions to the report of the referee and to the rulings of the judge thereon.

First. The referee held that the money derived from the sale of that part of the "Love Speculation Land" which is known in the case as
(638) the "Cold Mountain tract," it being $4,258.83, was received by the defendant R. A. L. Hyatt by virtue and under color of his office, and therefore his sureties were liable with him for any default in respect to that fund. The judge confirmed this ruling of the referee, and we concur therein. The clerk was appointed, in his official capacity, to make the sale and receive, invest, and disburse the proceeds of the sale made by him, and this Court has often adjudged that in such a case, as he acts officially, he is necessarily liable in the same way for any failure to properly discharge the duties of his trust. *The Judges v. Deans,* 9 N. C., 93; *State ex rel. Saunders v. Gaines,* 30 N. C., 168; *Broughton v. Haywood,* 61 N. C., 380; *Cox v. Blair,* 76 N. C., 78; *McNeill v. Morrison,* 63 N. C., 508; *Boothe v. Upchurch,* 110 N. C., 62; *Kerr v. Brandon,* 84 N. C., 128; *Waters v. Melson,* 112 N. C., 89.

In *Kerr v. Brandon, supra,* the Court held that the appointment of the incumbent of the clerk's office as received of an infant's estate did not impose any liability upon the sureties who signed his official bond; but there he was not appointed receiver in his official capacity as clerk, but independently; and in *Boothe v. Upchurch, supra, Justice Avery* refers to that case, and states that the act of 1868 (Battle's Rev., ch. 53, sec. 22) was afterwards amended, to meet the decision of this Court therein, by The Code, sec. 1585 (Revisal of 1905, sec. 1813).

In *Waters v. Melson, supra, Shepherd, C. J.,* further explains and distinguishes the case of *Kerr v. Brandon, supra.* But it will be seen by a careful examination of the latter case that the reasoning of the Court sustains fully our conclusion that the clerk's bond is liable for this fund. See, also, *Thomas v. Connelly,* 104 N. C., 342, and *Smith v. Patton,* 131 N. C., 396.

In the case last cited the present *Chief Justice* states the rule definitely and collects the principal authorities. No further discussion, therefore, is required.

Second. As to the payments to W. W. Stringfield from 4 August, 1908, to 1 June, 1909, both dates inclusive, amounting to $550 in all, the court was clearly right in reversing the referee's ruling by which defendant was charged with that sum and interest. The amount was paid by defendant to Stringfield under an order of the court previously made, and it authorized the disbursement for services rendered the estate. The mere fact that the order had been lost cannot deprive the defendant of his right to the credit. There is not any doubt as to its having been made, and the referee finds that it was made and signed by the court. As this finding of fact was approved by the judge, it concluded the matter. The failure to record the order could not prejudice the defendant's right to pay or W. W. Stringfield's right to receive the money. *In re Black*, 162 N. C., 457, 459. But while this is true, we do not see that the plaintiff is in any position to object to this ruling. He has not perfected any appeal or assigned any errors. The judge properly overruled (639) the referee's conclusions of law upon this finding.

Third. The exception of the defendant as to the charge of interest at the rate of 5 per cent on the fund realized from the sale of the "Cold Mountain tract" must be sustained. He should be charged only with interest at the rate of 4 per cent, the amount he received. The defendant was ordered by the court to deposit this fund, less the amount of the payment to Hugh A. Love, in the Bank of Waynesville and take for the same a certificate of deposit payable to himself and bearing "the best rate of interest obtainable for the same." He complied with this order as nearly as the requirements of the trust and the necessity of his checking upon the fund would permit. The court afterwards ordered certain amounts to be paid from this fund by the clerk, and he could not comply with the order without drawing checks on the bank for the same. In order to deposit the fund so that it would draw interest at the highest rate, and at the same time be subject to his checks, he agreed with the bank to deposit the fund with it at 4 per cent interest, this rate being the best he could secure on a checking account. It appears by the findings of the referee, approved by the court, that the bank would not allow 5 per cent, or any greater rate than 4 per cent, unless the entire amount was allowed to remain in the bank for six months on special deposit, called "time deposit" or "certificate of deposit" in the referee's report. As to the proceeds received from the sale of the Martin tract, which was $1,020, he was not able to deposit it so that it would draw interest, as in the case of the other fund. We are unable to understand, though, why the contention of the plaintiff is not the correct one, that defendant should have checked first upon the noninterest-bearing account in the bank before he resorted to any part of the other deposit which bore interest. The referee and the court ruled in accordance with this conten-

tion, and the account, in this respect, was properly stated. The defendant was not charged with any interest on the fund derived from the sale of the Martin tract of land, $1,020, and was allowed commissions on the same. He should be charged only with interest at the rate of 4 per cent on the other fund, as that was all he received or could have obtained under the circumstances, and his management of this fund was in substantial compliance with the order of the court. There is no evidence that he applied any part of the money to his own purposes or that he made any profit therefrom for himself.

Fourth. The exception by defendant as to the charge of 12 per cent interest after plaintiffs' demand for payment under Revisal, sec. 284, cannot be passed upon without additional findings of fact. It appears by the plaintiffs' own admission in the testimony that the parties agreed to settle, and were proceeding to do so, when the plaintiff "broke up the settlement" because he was not willing to allow the defendant the (640) receipts for the money paid to W. W. Stringfield. If defendant was able, ready, and willing to pay the defendant all that was then due, except that item, and offered to do so, or if plaintiff refused to accept the undisputed part, if there was such a part, unless the Stringfield receipts were excluded from the settlement, and not allowed in reduction of the amount to be paid by defendant, the defendant was not in default, but the fault was all the plaintiffs', and the latter could not recover the higher rate of interest.

It was held in *Bond v. Cotton Mills,* 166 N. C., 20, 23, that "interest, by way of damages, is not allowed as a conclusion of law, unless there has been some adequate default on the part of a debtor in reference to withholding the principal sum or a part of it," citing several authorities, the exception being in those cases governed by Revisal, sec. 1954. We cannot decide the question, though, without specific findings as to what was done by the parties at the attempted settlement, and as to what amount, if any, was then in the defendants' hands and due to the plaintiffs, the amount paid to Stringfield being allowed to defendant as a credit. Was there any clear balance? If so, how much? If there was a balance, defendant's liability for the higher rate of interest will depend upon whether a tender was made by him of it or whether a tender was excused by the conduct of the plaintiff. The facts may be found by the judge, a referee, or otherwise, as provided by law, unless the parties can agree upon them. When they are ascertained, the judge will rule upon them as to this item of interest.

Fifth. The defendant should have been allowed his commissions. We see nothing in his conduct of the business to indicate that he was unfaithful to his trust. It is said in 18 Cyc., 1162, where the law is fully and clearly stated, that compensation should be allowed unless

there has been some act or omission calling for punishment. In this case there is no evidence of fraud, willful default, or gross negligence which caused detriment to the estate, but it appears that it has been benefited by the services rendered. We find nothing in the report of the referee or in the administration of his trust by defendants to indicate any conversion, misapplication, or commingling of funds, or any other improper conduct in receiving and disbursing the same. It should not be right that plaintiff, and those he represents, should enjoy the benefit of defendant's services and not pay him for them. 18 Cyc., 1162, 1163, 1164, 1165.

This Court said in *Perkins v. Caldwell,* 79 N. C., 441, 445: "It is stated by his Honor that the executor acted in good faith and with strict integrity, and as we see nothing to the contrary, there is no reason why commissions should be withheld from him." In revising the account, commissions will be allowed, at a rate to be fixed by the court, as the law directs. The contention of plaintiff, based upon Revisal, sec. 2773, as to commissions of the clerk, cannot be sustained. That (641) section does not apply to the facts as they appear in this record.

No question was raised as to whether this action should have been brought by the clerk's successor under Revisal, sec. 906, 907, 908, and, therefore, we have not considered it, and do not express or mean to intimate any opinion in regard to it.

The report and judgment will be modified in accordance with this opinion, and the case will proceed further in the court below as indicated by it.

Error.

Cited: S. v. Gant, 201 N. C. 225 (1g); *McPherson v. Motor Sales Corp.,* 201 N. C. 308 (3g); *Pasquotank County v. Hood, Comr. of Banks,* 209 N. C. 555 (6d).

M. E. THREADGILL v. THE TOWN OF WADESBORO.

(Filed 12 January, 1916.)

1. Municipal Corporations—Cities and Towns—Limitation of Actions—Statutes.

Prior to the enactment of chapter 224, Laws 1891, title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under our statutes, Revisal, secs. 375 and 381, as construed by the decisions of our

Supreme Court, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit.

2. Same—Court's Decisions.

Where an owner has acquired title by adverse possession to a part of a street under The Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereafter by this Court cannot disturb the title theretofore acquired.

3. Municipal Corporations—Cities and Towns—Streets—Limitation of Actions—Appeal and Error.

Where one claims title to a part of a city street by adverse possession, and the city has pleaded the statute of limitation, and it has properly been ascertained and adjudicated by the trial court that the *locus in quo* was not a part of the city's street, it is *Held*, that the question whether such right by adverse possession could be acquired against a municipality becomes immaterial.

4. Evidence—Boundaries—Reputation—Declarations.

The principle which admits evidence of the reputation as to corners or boundaries of lands applies to both public and private boundaries.

5. Appeal and Error—Evidence—Harmless Error.

Where competent evidence is ruled out over objection, but is fully testified to by the same witness, it does not constitute reversible error.

6. Evidence—Municipal Corporations—Streets—General Reputation.

General reputation in a town of the width of its streets is incompetent in an action involving title, where it is not shown that the same did not take its rise at a comparatively remote period and *ante litem motam*.

CLARK, C. J., dissents.

(642) APPEAL by defendant from *Devin, J.*, at April Term, 1915, of ANSON.

Civil action to recover damages of defendant corporation for wrongfully entering on a lot of plaintiff in said town with intent to appropriate 8 feet of same extending along the line of Martin Street, etc.

Defendant denied liability, claiming that the 8 feet in dispute was a part of Martin Street and defendant had the right to enter and appropriate the same for the purpose indicated.

The entry complained of was in December, 1914.

On issues submitted, the jury rendered the following verdict:

1. Did defendant wrongfully enter upon the lands of plaintiff? Answer: "Yes."

2. If so, what damages is plaintiff entitled to recover? Answer: "$500."

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

Robinson, Caudle & Pruette for plaintiff.
J. W. Gulledge and Lockhart & Dunlap for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to show that she and those under whom she claimed had continuously occupied and passessed this lot under deeds purporting to convey the title, since 1848, and asserting ownership to the line of a fence which had continuously inclosed the property for that length of time.

As we understand the record, there was no substantial dispute as to the facts of this occupation inside the fence, but it was contended for defendant, and there was evidence on its part tending to show, that the fence in question was an encroachment on a public street of the town to the extent of 8 feet, and they had a right to reassert control of same for the public benefit.

Under the law of this State as it formerly prevailed, title by adverse occupation could be acquired against a municipality. This was established and recognized as a rule of property not only under our decisions applicable to the question, *Moore v. Meroney,* 154 N. C., 163; *S. v. Long,* 94 N. C., 896; *Crump v. Mims,* 64 N. C., 767; but the principle was embodied in our statute law in 1868, now Revisal, secs. 375 and 381.

Section 375 provides: "That the limitations prescribed by law shall apply to civil actions brought in the name of the State or for its benefit in the same manner as to actions by or for the benefit of (643) private parties," and section 381 of the statute, especially as to real property: "That all such possession as is described in the preceding section, under such title as is therein described, is hereby ratified and confirmed and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the State." Construing these sections, the Court has held that the maxim, *"Nullum tempus occurrit regi,"* no longer obtains here, even in the case of collecting taxes, unless the statute applicable to or controlling the subject provided otherwise. *Wilmington v. Cronley,* 122 N. C., 387; *Furman v. Timberlake,* 93 N. C., 67. This being the law as it formerly prevailed, the Legislature, in 1891, chapter 224, Revisal, sec. 389, enacted a statute, "That no person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square, or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way; and in all actions, whether civil or criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not be compe-

tent for any court to hold that such action is barred by any statute of limitations."

At the time this last statute was enacted and under the unchallenged testimony, plaintiff and those under whom she claimed had occupied the property to the line of her fence, asserting ownership, for more than forty years, and it was not then open to the Legislature to reassert the lost ownership of the street except under the power of eminent domain vested in defendant by the law and for the public benefit. Defendant's entry here, however, was under claim of right and without resorting to this principle.

We were referred by counsel to *S. v. Godwin,* 145 N. C., 461; *Moose v. Carson,* 104 N. C., 431; *Turner v. Comrs.,* 127 N. C., 153, as being against the operation of the statute of limitations for plaintiff's protection. In *S. v. Godwin* the Court was referring to the law as it should prevail under the last statute on the subject, that of 1891, and in the opinion *Associate Justice Walker,* referring to the law prior to the statute, was careful to note that the case of *Moose v. Carson,* 104 N. C., 431, seemed to have overlooked the decision of the Court in *S. v. Long,* in which it was directly held, as stated, that title by adverse occupation could be acquired against the town. True, the case of *Moose v. Carson* gives decided intimation to the contrary, and this was approved in the subsequent case of *Turner v. Comrs., supra.* But both of these cases seem to have overlooked or ignored the decisions of *S. v. Long* and *Crump v. Mims,* and also the statute law on this subject ever since the enactment of The Code of 1868, and by which the maxim of *nullum tempus occurrit regi* was in effect abrogated.

(644) The towns are only supposed to come under the influence of this maxim when and to the extent that they are properly considered governmental agencies of the State, and, if the State itself is barred by the statute, its subordinate agents may be barred also.

On the particular question now presented, the position for the future is not of great moment, the statute of 1891, Revisal, sec. 389, having established the principle suggested in *Moose v. Carson* and approved in *Turner v. Comrs.* as the law on the subject. And even if *Moose v. Carson* and *Turner's case* should be considered as modifying the former law, the first of these cases was not decided by this Court until September, 1889. At that time plaintiff's title had already matured, and, having been acquired under decisions constituting a rule of property, it could not be affected by judicial reversal of the principle in another case nor disturbed except under the power of eminent domain, as heretofore stated. *Hill v. R. R.,* 143 N. C., pp. 539-573; *Kirby v. Boyette,* 118 N. C., 244.

While we hold that the authorities referred to are, on the evidence, in any aspect of it, decisive of the case in plaintiff's favor, the position discussed is hardly open to defendant on the record, because the court below, being of opinion that if the land entered on by defendant had ever been a public street, as claimed, no statute of limitations would apply, submitted the issue to the jury on the question whether there had been any encroachment on the street, and they have determined that essential fact against defendant. In that aspect the case was fully developed and fairly tried, and we find no reason for disturbing the result.

As evidence that the streets and squares of the town were as claimed by them, defendants offered an old survey and plat made by David Carpenter in 1848, showing regular squares with streets 66 feet wide, etc. There was much evidence on the part of plaintiff that this plat was in no wise a correct representation of the plan of the town as laid out in or shortly after 1783, and in order to establish that the plat was correct, Mr. J. A. Little, a witness for defendant, was asked whether he knew that an old locust tree had reputation of being a pointer to a town corner, etc., and objection by plaintiff was sustained. The witness had fully qualified himself to speak to the reputation of this corner, and we do not see that the question was incompetent. The principle which admits evidence of this character applies to both public and private boundaries. As originally adopted and prevailing in England, it was confined to questions of public boundary, *Bland v. Beasly,* 140 N. C., pp. 628-630, but the objection may not avail defendant on the record, for witness was allowed to answer the question and speak fully and at large as to the pointer and its placing and the surveys made from it.

And the same answer may be made to an objection to a ruling as to the evidence of a witness, F. J. Coxe. He was asked as to the standard width of the blocks and streets of the town, and he said (645) he had, in his investigations, seen an old map of the town which had been lost and a blue-print, which was an exact copy, he had verified. He was asked if he knew the width of the streets and blocks as represented by the map and by general reputation of the town of Wadesboro. On the question of general reputation of the town, the witness had not qualified himself to speak, for, while such evidence is admissible, it must be first shown, among other things, that the same took its rise at a comparatively remote period and always *ante litem motam,* neither of which was shown; and as to the information derived from the map, the copy which the witness verified was introduced on the trial and showed the blocks and squares to be as he claimed. The plat here would seem to be the best evidence, and the jury had the benefit of it on the issue.

As heretofore stated, under the view of the law as held by the trial court, the issue was largely a question as to whether there had been any encroachment on the public streets.

After a full and fair investigation, it was resolved by the jury against defendant, and we find no error to defendant's prejudice, certainly that gives it any just ground of complaint. The judgment, therefore, is affirmed.

No error.

CLARK, C. J., dissents.

Cited: Lumberton v. Branch, 180 N. C. 252 (1f); *Barnhill v. Hardee,* 182 N. C. 86 (2b); *R. R. v. Dunn,* 183 N. C. 429 (1g); *Manning v. R. R.,* 188 N. C. 665 (1g); *Gault v. Lake Waccamaw,* 200 N. C. 599 (1g); *Wilkes County v. Forester,* 204 N. C. 167 (1g); *Charlotte v. Kavanaugh,* 221 N. C. 265 (1g); *Raleigh v. Bank,* 223 N. C. 293 (1g); *Raleigh v. Bank,* 223 N. C. 305 (1j); *Guilford County v. Hampton,* 224 N. C. 819, 820 (1g).

SUSAN W. HORNE ET AL., ADMINISTRATORS, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 January, 1916.)

Railroads—Headlights—Trials—Evidence—Nonsuit—Questions for Jury.

On a motion to nonsuit upon the evidence the testimony of the defendant will be considered only when it is in the plaintiff's favor; and where the evidence tends to show that the plaintiff's intestate, a section foreman of defendant railroad company, was riding upon a hand-car at night on defendant's track, with other employees, where an approaching train with a headlight would have been seen for miles, and the car was struck by defendant's train coming rapidly upon it without a headlight, and not observed in time for the intestate to have saved himself, and causing his death, it is sufficient to be submitted to the jury upon the question of defendant's actionable negligence. Although the intestate was disobeying the orders of the company at the time, his contributory negligence on the facts in evidence was for the jury.

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

APPEAL by plaintiffs from *Allen, J.,* and a jury, at April Term, 1915, of CUMBERLAND.

(646) Action to recover damages for wrongful death, alleged to have been caused by the negligence of the defendant.

Plaintiffs' intestate was a section foreman of the defendant. He had been at work at New Berlin, and on the night he was killed he and other employees of the defendant went to Farmers on a hand-car. He was killed on his return, at night, by an engine of the defendant, which, according to the evidence of the plaintiff, had no headlight.

The evidence of the plaintiffs tended to prove that their intestate was a section foreman in the defendant's employ at New Berlin on 1 September, 1914. On that night he took the lever-car and went to Farmers to attend to some business, as there was no train in that direction, and took with him five or six hands. He did not say whether the business was his or the business of the company. He waited for the passenger train to pass, and then they put the lever-car on the track and started back to New Berlin. The track was straight at that point for 10 miles, 5 miles in each direction, and, according to plaintiffs' evidence, they were looking out both front and rear for any approaching train, though there was none scheduled to pass at that hour; they could have seen a headlight 5 miles off. Suddenly, 35 to 40 feet in front of them, out of the darkness there loomed up an engine which was running without any light at all, and at the rate of 50 or 60 miles an hour; that an alarm was given and everybody jumped off but the intestate Horne, who was struck and killed. The engine was going so fast that it went half a mile or at least a third before it stopped. A witness said that he could have seen a headlight on a straight track that night 10 or 12 miles; the witness further said that the lever-car could be seen from the engine at least three-quarters of a mile off under the glare of an electric headlight. He further testified that there were three public crossings between the station at Farmers and where Horne was killed, and that the engine did not blow at either of these crossings or ring any bell. In going from New Berlin to Farmers they went on the main line 5 miles east in the direction of Wilmington; they started about 7:30 p.m. and got there about 8:10 p.m., and started back at midnight. The witness further said that some foremen used their lever-cars at night, but it was not an habitual custom. There was no evidence from the plaintiff that it was against the rules of the company to use the lever-cars at night. Several witnesses testified that the night was slightly foggy, but there was no light whatever on the engine, and if there had been they could have seen it; that there was neither headlight nor sidelights; that if the engine had had a headlight the engineer could have seen three-quarters of a mile ahead of him; that the witness had ridden on an engine with an electric headlight many times and kept a lookout, and could see at night three-quarters of a mile ahead under the electric light. That the deceased said that he was going down to Farmers to see the agent, and that his force had to move from New Berlin the next morn- (647)

ing. The witnesses also testified that if there had been an electric headlight on the engine they could have seen it 2 or 3 miles down the track, in ample time to have gotten the car off the track, which they could have done in a couple of minutes.

The defendant introduced a rule of the company forbidding the use of hand-cars at night or in foggy weather without the permission of the roadmaster, and the roadmaster testified that he had not given permission to use the car on the night the intestate was killed.

The defendant also introduced evidence tending to prove that the engine was properly equipped with lights and that signals were sounded at the several crossings.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

Cook & Cook, J. M. Williford and Sinclair, Dye & Ray for plaintiffs.
Rose & Rose for defendant.

ALLEN, J. The evidence for the plaintiff, which must be accepted as true for the purpose of nonsuit, establishes the negligence of the defendant in that it was running its train in the night-time without a headlight, and it is conceded that the judgment of nonsuit cannot be sustained except upon the ground of contributory negligence.

There are two valid objections to coming to this conclusion.

The first is that, while after much discussion the rule was adopted that a judgment of nonsuit might be entered if it clearly appeared from the evidence of the plaintiff that he was guilty of contributory negligence, this rule has never been extended so as to permit the consideration of evidence offered by the defendant tending to prove contributory negligence.

In this case the negligence attributed to plaintiffs' intestate is that he was upon the track in violation of the rules of the company, and there is nothing in the plaintiffs' evidence to show that a rule was in existence or that the intestate was at the time of his death violating any rule.

The burden of the issue of contributory negligence was on the defendant, and in order to sustain this burden it introduced a rule of the company which forbade the use of the hand-car at night without the permission of a superior officer, and it also introduced the officer to prove that he had not given the permission. If this evidence coming from the defendant was not believed by the jury, the issue of contributory negligence could not have been answered against the plaintiff, and the jury alone has the right to say whether or not the evidence is true.

(648) This principle is vital under a system which makes jurors triers

of the fact, and a departure from it would invest the judge with the power to pass on the weight of the evidence and to determine the fact.

The second is that if it be conceded that the intestate was guilty of negligence the question of proximate cause was for the jury, and ought to have been presented to them either under a separate issue or under an instruction that although the plaintiff was upon the track in violation of the rules of the company, and was therefore negligent, that he would be entitled to recover damages if, notwithstanding that negligence, the jury found as a fact that if the defendant had had a headlight the intestate would have been discovered in time to avoid the injury, or that if the headlight had been present the plaintiffs' intestate would have seen it in time to take the car from the track.

The evidence on the part of plaintiffs tends to prove that the track of the defendant in the direction from which the train was coming was straight for a distance of 5 miles; that a headlight could have been seen at that distance; that those on the hand-car were looking in that direction for the approach of a train; that if there had been a headlight they could and would have seen it in time to take the hand-car from the track; and that with a headlight the engineer could easily have seen the car in time to avert the injury.

In *Heavener's case,* 141 N. C., 245, the Court approved an instruction that "If the jury should further find from the evidence that if there had been a proper light on the engine, or if the bell had been ringing, the intestate would have had notice of the approaching train in time to escape the danger, and if the plaintiff by reason of not having such notice or warning was injured, then such failure to have the headlight or other proper signal was continuing negligence and would be the proximate cause of the injury," and this was affirmed in *Shepherd v. R. R.,* 163 N. C., 520.

If the plaintiffs' intestate was negligent in violating a rule of the company, was his negligence greater than the negligence of a person who is killed while upon the track in a state of voluntary drunkenness? It would seem not, and in *Griffin v. R. R.,* 166 N. C., 626, it was held that the question of the contributory negligence of one killed upon the track while intoxicated was for the jury, the Court saying: "We have the facts in evidence that the engine was without any headlight; furthermore, that it ran over and killed the intestate. . . . We have, therefore, in evidence both the negligence and the injury. . . . It is immaterial whether the intestate was a licensee or a mere trespasser. The defendant owed it to him and to all other persons, whether on the track rightfully or wrongfully, to have had a headlight upon its engines in order that the engineer might be enabled to discover, not only human beings, but any obstruction upon the track. . . . There is evidence in the

(649) record from which the jury may find, if they see fit, contributory negligence upon the part of the intestate; but the evidence is not of that character as will justify the Court in any view of it to sustain a motion to nonsuit upon that ground."

This case has an important bearing upon the question before us, because it establishes the principle that although the intestate was negligent, the defendant owed him the duty to have a headlight, *"whether on the track rightfully or wrongfully,"* and that he could not be declared guilty of contributory negligence as matter of law.

If so, why does not the same rule prevail in this case, as the most that can be said of the conduct of plaintiffs' intestate, if he was violating a rule of the defendant, is that he was wrongfully on the track?

In *Tyson v. R. R.*, 167 N. C., 216, the plaintiff's intestate was killed by a train running without a headlight, and the issue of contributory negligence was answered in favor of the defendant.

A recovery of damages was sustained, and *Justice Brown* says, in discussing the question as to whether there was evidence to support the finding that notwithstanding the negligence of the intestate, the defendant's engineer by the exercise of ordinary care could have avoided the injury: "There is evidence in this case that the engineer, by keeping a watchful lookout, with a good headlight, could have seen the intestate in the position described by the witnesses, and, going up grade, could have stopped his train within 50 yards. There is evidence that he had a very poor oil headlight, and it was about dusk at the time when his train killed the intestate.

"Taking all of these facts together, we think there is sufficient evidence to have gone to the jury for their consideration to the effect that if the engine had been properly equipped with a proper headlight, and the engineer had kept a diligent lookout ahead of him, he could have discovered, by reasonable care, the condition of the intestate, and could have stopped his train in time to have saved his life."

Again, the Court said in *Cullifer v. R. R.*, 168 N. C., 311: "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."

In *McNeill v. R. R.*, 167 N. C., 390, the Court concludes the opinion with this statement: "The theory upon which recoveries are sustained when a person upon the track is killed or injured by a train running in the night without a headlight, although not apparently helpless, is that the absence of the headlight is negligence, and as its presence would prob-

ably give notice of the approach of the train by throwing light on the track and upon the person, the failure to have the light is some (650) evidence of proximate cause."

In other words, if it is admitted that both the defendant and the intestate of the plaintiff were negligent, the negligence of the plaintiffs' intestate does not bar a recovery unless it was the proximate cause of the injury, and the question as to whether it was the proximate cause is for the jury, if two reasonable minds could come to different conclusions upon the question; and here there is evidence that although the intestate was negligent, if the defendant's train had been running with a headlight he would not have been injured, because the headlight would have been seen, if the evidence of the plaintiff is to be believed, in time to take the car from the track, or the engineer could with a headlight have discovered the intestate in time to avoid the injury.

In *Boney v. R. R.*, 155 N. C., 107, the plaintiff's intestate, an engineer, was killed by running into an open switch, and at the time of his death he was violating a rule of the company by running his train at a speed of 30 miles an hour, when the rule required that he should not approach the switch at more than 6 miles an hour. A recovery of damages was sustained upon the ground that although he was negligent, the defendant could have averted the injury by the exercise of ordinary care. The Court said: "If the intestate knew that there was no light at the switch, and was running in excess of 6 miles an hour, he was negligent; but it is not every act of negligence on the part of the plaintiff that is contributory negligence in its legal sense. It is not contributory unless it is the real cause of the injury; nor is it so if the defendant, by the exercise of ordinary care, can avert the injury, notwithstanding the negligence of the plaintiff."

Reversed.

CLARK, C. J., concurring: This is an appeal from a nonsuit in an action for wrongful death. It is elementary law requiring no citation of authorities that in such cases the evidence for the plaintiffs must be taken as absolutely true and with the most favorable inferences that can be drawn from it. If that were not so, a plaintiff would be deprived of his constitutional right to a trial by jury, since the jury might find the facts according to his testimony and in the light most favorable to him.

In no aspect of the case should the plaintiff have been nonsuited. If the engine was carrying no headlight at all, which must be taken as true on a nonsuit, then under *Greenlee v. R. R.*, 122 N. C., 977, and *Troxler v. R. R.*, 124 N. C., 189, which have been cited and approved very many times and which have been held unquestioned law up to date—see citations in Anno. Ed.—contributory negligence could not have availed

as a defense. In *Greenlee v. R. R., supra,* it is held that the
(651) failure of a railroad company to equip its trains with modern safety appliances—in that case, self-couplers—was negligence *per se,* continuing to the time of an injury, and made the company liable even as to an employee, whether such employee contributed to the injury by his negligence or not. It was held that the company in such case could not defend either upon the ground of contributory negligence or assumption of risk.

In *Troxler v. R. R.,* 124 N. C., 189, the Court held, reaffirming *Greenlee v. R. R.,* that "Reason, justice, and humanity, principles of the common law, irrespective of congressional enactment and Interstate Commerce Commission regulation, require modern safety appliances to be used on a train, and when there is failure to do so the common carrier is guilty of culpable, *continuing* negligence which cuts off the defense of contributory negligence and the negligence of a fellow-servant, for such negligence is the *causa causans* even as to an employee." For a stronger reason, the failure to have an electric headlight upon an engine running at great speed at night and in violation of law is such negligence as precludes the defense of contributory negligence. This has been held again and again as to engines running at night without an electric headlight. These cases are familiar to every lawyer. Among the more recent are *Shepherd v. R. R.,* 163 N. C., 522; *Powers v. R. R.,* 166 N. C., 599, and there are many others.

In the very recent case of *Powers v. R. R.,* 166 N. C., 601, the Court held that "running a train at night without a headlight is continuing negligence. *Lloyd v. R. R.,* 118 N. C., 1010; *Mayes v. R. R.,* 119 N. C., 758; *Mesic v. R. R.,* 120 N. C., 491; and *Willis v. R. R.,* 122 N. C., 905. The Legislature has adopted that rule by making the failure to carry a headlight negligence *per se.* By Laws 1909, ch. 446, 3 Pell's Rev., 2617, all railroads are required to carry electric headlights upon their locomotives upon their main line, as this was, and by 3 Pell's Revisal, 3753a, violation of that requirement is made a misdemeanor. This Court has always held that any act of a common carrier which is a violation of law is negligence *per se.*"

It is uncontradicted here that this engine was running on the main line between New Berlin and Farmers (and if it was not, that is a matter in defense), and the failure to carry a headlight of at least 1,500-candle power being made an indictable offense by Revisal, 3753a, the engineer and the defendant were both guilty of manslaughter. It is impossible that the defendant should not be civilly liable for damages for an act for which it is responsible to answer on the criminal docket.

While we must take the evidence of the plaintiff as true, it is not amiss to say that the engineer, who was a witness for the defendant,

testified as follows: "They use electric headlights on the road from Wilmington to Florence (which is where this accident occurred). I did not have an electric headlight that night. I had an oil (652) light." He went on to say that on this night he could have "seen ahead 30 or 35 feet," and that he was going 35 miles an hour. The conductor of that train also testified that "On the engine there was an oil headlight . . . an oil headlight like that would not distinctly illuminate 30 feet ahead of me. I would judge that it would throw a light about 30 feet—something like that. I would not say exactly." The fireman also testified that it was an oil headlight, and that it was his business to keep it clean.

W. H. Jones, the roadmaster, also testified for the defendant that "An engine with an oil headlight will disclose an object 25 feet away." S. M. Beasley, also a roadmaster and witness for the defendant, testified that an electric headlight can be seen 6 or 8 miles, and that with such a light a lever-car could be seen by an engineer 300 feet away probably. The evidence for the plaintiffs, which must be taken as true, is that the electric headlight could have been seen by the parties on the lever-car from 2 to 5 miles away and that the lever-car could have been seen by the engineer with an electric headlight three-quarters of a mile off.

Even if we take the defendant's evidence as true, this engine was "running wild," that is, it was an extra, not running on any schedule and was being run at midnight from 30 to 35 miles an hour on the main line, in violation of law without an electric headlight and with an oil light which could be seen only some 25 or 30 feet away. If we take, as we must, the plaintiffs' evidence to be true, the engine was running 50 or 60 miles an hour without any headlight or sidelights whatever. The judge might well have told the jury that if they believed the defendant's own testimony the company and the engineer were running in violation of law on the main track without an electric light and were all guilty of manslaughter, and that in this action the only question was as to the amount of damages.

It was settled by this Court in *Deans v. R. R.*, 107 N. C., 686, that notwithstanding a trespasser was lying asleep on a track, the railroad company was responsible if the engineer by proper watchfulness could have discovered him in time to have avoided the killing or injuring him. This has been followed ever since. In *Pickett v. R. R.*, 117 N. C., 632, it was said that this principle was derived from *Davies v. Mann*, 10 M. & W., 545, and that "The party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it," citing 2 S. & R. Neg., 165. Ever since this has been the uniform law recognized in this State. It has been

applied in cases like *Arrowood v. R. R.*, 126 N. C., 629, where the deceased was a trespasser lying down on the track, and the defense set up was that owing to the road winding around the mountain the engineer could not see him by reason of the smokestack, and the fireman was busy, (653) but the Court held that if the engineer and fireman were not sufficient lookout the defendant should have had a third man for that purpose. It was applied in *Clark v. R. R.*, 109 N. C., 430, where the deceased was walking along the railroad, and indeed further back, in *Troy v. R. R.*, 99 N. C., 298, where the Court affirmed the present writer, then on the Superior Court Bench, in holding that though walking on the track by a trespasser would constitute contributory negligence, it would not bar recovery if the engineer by reasonable care could have avoided the injury.

The decisions are uniform that in cases of injury to a trespasser on the track there should be a third issue submitted, "Whether, notwithstanding the contributory negligence of the plaintiff, the defendant could with reasonable care have avoided the injury," and that the burden of this issue is upon the defendant. If, therefore, the *Greenlee* and *Troxler cases* and the long line of decisions in approval thereof should be overruled, and if, further, we could disregard the statute which makes the failure of the locomotive to carry an electric headlight of at least 1,500-candle power an indictable offense, and should overrule the decisions which uniformly hold that when an act is committed in violation of a statute the defendant cannot excuse itself by pleading contributory negligence, and treating this as simply a case where the deceased was a trespasser on the track, still the burden of proof would be on the defendant on the third issue to prove that, notwithstanding the contributory negligence of plaintiffs' intestate, it could not by reasonable care have avoided killing him.

It is not shown by plaintiffs' evidence that he was forbidden to go on the track, and the burden was on the defendant to show that fact, and the jury might not have believed it. But if it were admitted that the rules forbade him to go on the track with a lever-car at night, he could have been in no worse case than a trespasser, and the burden was on the defendant to show that with reasonable care, such as the use of an electric headlight, running at an ordinary rate of speed and blowing at the crossings, the defendant could not with a reasonable outlook have avoided killing the intestate. Whatever the obedience which should be paid to the rules of the company, they are not of such superior authority to the statutes of the State that a violation by an employee of a rule of the company entitles the defendant to disregard the requirements of law as to headlights and reasonable care in keeping an outlook, or that it

entitles the defendant to consider that the deceased was outlawed and that it owed him no duty.

HOKE, J., concurring: I concur in the disposition made of this appeal, on the ground that the testimony clearly shows negligence on the part of the company in running its engine without a headlight, and which resulted in intestate's death.

I deem it not improper to say, however, that as now advised, if (654) it should be made to appear that the intestate at the time he was killed was running a hand-car on the railroad track contrary to the orders or rules of the company, it would be such an act of contributory negligence on his part as would bar a recovery. As the evidence tending to establish this defense on the record as it now appears all comes from the testimony introduced by defendant, it may not be considered on a motion to nonsuit. I therefore concur in the judgment awarding a new trial.

WALKER, J., dissenting: Plaintiffs sued to recover damages for the death of their intestate, caused, as they alleged, by the negligence of the defendant. The evidence was to the effect that W. B. Horne was, on 14 September, 1915, employed by defendant as foreman of an extra section force, and on the night of said day he rode on his lever- or hand-car with six other employees from New Berlin to Farmers station, about 4 miles distant, and remained at the latter place several hours, at his uncle's home, on his own business. His shanty-car was at New Berlin. He started back to Farmers station about midnight on the lever-car, and when they had gone about one-half of a mile they were overtaken by an engine and plaintiff was killed by the collision. There was evidence that the engine had no light and had not given the usual signal at the crossing near by, and was running at a high rate of speed. There was evidence, on the contrary, to show that the engine was provided with all its lights, headlight, classification lights, and also two rear markers, and running 30 or 35 miles an hour, and that it gave all station and crossing signals. This engine was going from Wilmington to Chadbourn to relieve another engine that had been disabled on a branch line, and there was evidence that it was properly equipped and in good condition, with headlight burning and brakes in proper order. The intestate had been forbidden to use a hand-car after dark, except by special authority or authority of the roadmaster, which he did not have that night, and he was not, at the time he was killed, transacting any business or performing any duty for the railroad company, but was on a visit to his uncle.

We will, in the consideration of the case, confine ourselves to so much of the testimony as is most favorable to the plaintiffs, according to the

usual rule. *Ridge v. R. R.*, 167 N. C., 510; *Harris v. Guaranty Co., ibid.*, 624.

If we take plaintiffs' own view of the evidence, we can see no error in the judgment of the court. The intestate had control and management of the lever-car on which he was riding. It was in his possession and was furnished to him for the purpose of better performing his work as section master, and he had no right to use it for his own private purposes.

When he did so, he became a trespasser on the track of the com-
(655) pany, and had no greater right than any ordinary trespasser using the track as a footway, and perhaps less right, as he was obstructing the track under very dangerous circumstances, which were calculated to imperil his life and the lives of his coemployees, or helpers, and also the property of the company and the lives of those on its engines and cars. It has been said that a railroad company owes a greater duty to one on its track with its consent than it does to a trespasser, *Boggera v. R. R.*, 64 S. C., 164; and especially would this be true as to one who is using its tracks in the night-time in open violation of its rule made for his own as well as the protection of other persons, and of the company's property. It does not ordinarily owe to him the duty of equipping or of running its trains in any particular manner or at any special rate of speed. *R. R. v. Stegall,* 105 Va., 538. A trespasser who uses the tracks of a railroad company, especially when he has been forbidden to do so, must look out for himself and take proper measures and precautions for his own safety, if he is not disabled and can do so. The following rules in such cases have been formulated by a careful and learned text-writer:

"It may be stated, as a general rule, that any one who goes upon the track or premises of a railroad company, except at a public crossing or in a highway, without the invitation or license of the company, express or implied, is a trespasser. . . . The general rule is that the owner or occupier of premises owes no duty to a trespasser thereon except to do him no willful or wanton injury. A trespasser is a wrong-doer, and it is a general principle of jurisprudence that the courts will not aid a wrong-doer. The fact that the trespasser is a wrong-doer does not, however, justify malicious, wanton, or willful maltreatment of him, and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes be sufficient evidence of willfulness or wantoness. But neither negligence nor willfulness can ordinarily be shown in this way where an adult or person apparently able to take care of himself is upon a railroad track, because the railroad employees have a right to assume, in the absence of anything to the contrary, that he will get off the track or take such other precautions as may be available to avoid injury to himself. . . . A railroad company owes trespassers no

contractual duty. Indeed, as already stated, the general rule is that it owes them no duty except not to willfully injure them. . . . What we have already said concerning the limited duty to trespassers applies to trespassers upon a railroad track. It is generally and, we think, correctly held that a railroad company is not bound to keep a lookout for trespassers upon the track. . . . As a general rule, the company's employees may presume that one apparently able to do so will get off the track in time." 3 Elliott on Railroads, sec. 1252 to 1258.

Of course, these principles have been modified by us where the (656) trespasser is on the track either in a helpless condition or deprived of his bodily or mental faculties in some way, so that he is not able to care for himself; but there are no such facts in this case.

The company was not bound to anticipate that the intestate would deliberately violate its instructions and use the car on its tracks after darkness had set in. He was, therefore, guilty of negligence; and if there are any degrees of negligence, his may well be called gross, and plaintiffs have no right to say that the defendant should have looked out for him when he did not look out for himself, and was where he was not expected to be, with a dangerous obstruction, when he was killed.

But we will assume that defendant was negligent also, and treat the case as one of mutual negligence. It was no more than that, as, if defendant had no light, neither did plaintiffs' intestate, and if he had provided himself with one, which he could easily have done, and should have done when using the track without permission or contrary to orders, this unfortunate accident would not have occurred. He knew, or should have known, that the company had the right to use its track at any and all times, and, even if there was no regular train scheduled for that particular time, that emergencies often arise when its engines and cars have to be brought into immediate use, as was the case here.

The track of a railroad, as it seems necessary to repeat, most emphatically, again, is always a place of danger, and any man who uses it for his own purposes, and especially when he has been positively forbidden to do so, should exercise the highest degree of care and vigilance for his own safety, as we have so often said. *McAdoo v. R. R.*, 105 N. C., 140; *High v. R. R.*, 112 N. C., 385; *Syme v. R. R.*, 113 N. C., 558; *Exum v. R. R.*, 154 N. C., 408; *Talley v. R. R.*, 163 N. C., 567; *Abernathy v. R. R.*, 164 N. C., 91; *Hill v. R. R.*, 166 N. C., 598; *Ward v. R. R.*, 161 N. C., 180; *Treadwell v. R. R.*, 169 N. C., 694, and *Hill v. R. R., ibid.*, 740; and there are many other such authorities, but we have tried to cite some of the earliest decisions with some of the latest, so as to show that there has been a strict, steady, and unvarying adherence to the doctrine.

As especially applicable to plaintiffs' contention, and as fully answering it, we would direct attention to *Beach v. R. R.*, 148 N. C., 153, where we unanimously held that: "A railroad track is intended for the running and operation of trains, and not for a walkway, and the company owning the track has the right, unless it has in some way restricted that right, to the full and unimpeded use of it. The public have rights as well as the individual, and usually (and reasonably) the former are considered superior to the latter. That private convenience must yield to the public good and public accommodation is an ancient maxim of the law. If we should, for a moment, listen with favor to the argu-
(657) ment, and eventually establish the principle, that an engineer must stop, or even slacken his speed, until it may suit the convenience of a trespasser on the track to get off, the operation of railroads would be seriously retarded, if not made practically impossible, and the injury to the public might be incalculable. The prior right to the use of the track is in the railway (especially) as between it and a trespasser who is apparently in possession of his senses and easily able to step off the track." And in *Treadwell v. R. R., supra,* we said, in reference to the same kind of contention: "A court of the highest authority has said that where it is known, as it should be, that a railroad company's right of way is being constantly used for its trains, and is at all times liable to be used for their running and operation in transporting freight and passengers, as a public carrier under the highest legal obligation to serve the public diligently and faithfully as such . . . 'the track itself, as it seems necessary to repeat with decided emphasis, is itself a warning. It is a place of danger, and a signal to all on it to look out for trains, and it can never be assumed that they are not coming on a track at a particular time when it is being used for the convenience of trespassers or licensees, and, therefore, that there can be no risk to a pedestrian for them.' "

We have specially referred to these cases, as it is insisted by plaintiffs that defendant's engine was not making a regular trip, and, therefore, caught the intestate unawares. Engines do not run regularly without any cars, except in shifting yards or at stations. This engine was running "light," as it is said in the case, to take the place of one on another line, which had in some way been disabled, and this illustrates what a dangerous place a track is, as at any moment, day or night, it may be used between the times fixed by the regular schedules, and for this reason it is always "live," in the sense that an engine or a train may pass a given point at any time. If the intestate had taken any thought for his own safety, he would have carried either a lantern or some other device as a warning of his presence on the track, or not have used the track at all without or contrary to orders.

But we will assume that both the intestate and the defendant were negligent in more than one respect, and it then becomes a case of concurrent negligence, both acts of negligence uniting at one and the same time to cause or produce the result; and in support of this view we need cite only two cases decided by this Court. In *McAdoo v. R. R.*, 105 N. C., 150, it appeared that the plaintiff was stricken by an engine while he was on, or near, one of the defendant's tracks, and the Court said with reference thereto: "If the plaintiff had alleged that the defendant company, or its servants, had willfully, wantonly, purposely, or maliciously run an engine against and injured him, a very different question would have been presented. In *Manly v. R. R.*, 74 N. C., 655, this (658) Court said: 'When the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in default, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied, upon the ground that the injured party must be taken to have brought the injury upon himself.' That case was subsequently cited with approval as to the first point in *Rigler v. R. R.*, 94 N. C., 610, and in *Walker v. Reidsville*, 96 N. C., 382. See, also, *R. R. v. Lowdermilk*, 15 Ind., 120; *R. R. v. Adams*, 26 Ind., 76; 2 Woods R. L., 319." And we held in *Watts v. R. R.*, 167 N. C., 345, 346: "The nonsuit must clearly be sustained by reason of the plaintiff's own negligence, existent to the very time of the impact; for, according to his statement, he was under the car for his own purposes, on a live track, engaged in the performance of no duty whatever, awake and in full possession of his faculties, and utterly inattentive to his own safety up to the very time of the injury. If it be conceded that the defendant was negligent in backing on the siding without signal, the case presents a typical case of contributory negligence, concurring with that of the plaintiff and barring his claim for damages. *Ward v. R. R.*, 167 N. C., 148." But if the defendant was guilty of negligence, it was not actionable unless, as held in *McNeill v. R. R.*, 167 N. C., 396, it was the proximate and not merely a concurring cause of the injury. This is, of course, a very just doctrine, because no man will be permitted by the law to take advantage of his own wrong, and if his own want of care proximately contributes to his own hurt, or if it concurs with the wrong of someone else in doing so at the time the injury is received, the law denies a recovery by him, attributing the result to the fault of both.

We held in *Hill v. R. R.*, 166 N. C., 592, that a motor-car—and the same rule, of course, applies to a lever- or hand-car, as they are practically of the same make—moving on a track of the company in the night should be provided with proper and sufficient lights or signals that would indicate its presence on the track, and that for any injury caused

by a failure to display a light or give other warning of its presence the company would be liable. But in that case the liability was based upon the ground that the person who had run the car without a light was acting under the authority of the company, while here he had no such authority, but was acting of his own will, and really contrary to orders. We only cite that case to show that the doctrine as to lights and signals applies to hand-cars being run in the darkness, and the intestate should have displayed a light or given some warning of the car being on the track, especially as it was there at an unusual time, when the company had forbidden him to use it. It is an admitted principle that "where a servant voluntarily, and of his own motion, exposes himself to risks
(659) outside the scope of his regular employment, without or against the order of the master, or vice-principal, and is injured thereby, the master is not liable." 26 Cyc., p. 1224, and note 8. This text is supported by a great array of authorities to be found in the note. *R. R. v. McWhorter,* 115 Ga., 476; *Green v. R. R.,* 85 Minn., 318; *Parent v. Mfg. Co.,* 70 N. H., 199. We have made a similar ruling in *Whitson v. Wrenn,* 134 N. C., 86; *Avery v. R. R.,* 137 N. C., 135; *Stewart v. Carpet Co.,* 138 N. C., 64; *Hicks v. Mfg. Co., ibid.,* at p. 329; *Holland v. R. R.,* 143 N. C., 439; *Patterson v. Lumber Co.,* 145 N. C., 45. "The employee is not absolved, in cases of this sort, at least, of all obligations to have a proper care for his own safety and to work with prudence in the presence of known and observed danger; nor is he free to disobey his employer's orders, where such disobedience becomes the proximate cause of the injury, either sole or concurrent." *Hicks v. Mfg. Co.,* 138 N. C., 329. "A servant who voluntarily, without request from the master, engages in work which he was not hired to perform assumes the risk of injury attendant thereon." *Parent v. Mfg. Co., supra; McGill v. Granite Co.,* 70 N. H., 125. "Rules and orders are promulgated and are to be enforced for the protection of the public, of fellow-servants, and of the employer's property, and cannot be disregarded or annulled by an employee with impunity. The latter cannot disobey orders upon the ground that, in his opinion, there is no reason for their further observance. When one employed to do a designated kind of work, or to work at a particular place, voluntarily goes to a place different from that assigned by the contract of employment, he cannot successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury." *Green v. R. R.,* 85 Minn., 318. "Here the servant was ordered to do his work in a safe way, and he preferred to do it in another and what proved to be a dangerous way. Why should the master be liable if the servant acted in disobedience to his orders and was thereby hurt? It must be admitted that he was the author of his own injury. If it was

necessary that the method adopted by him should have been not only in disobedience of his orders, but in itself dangerous, in order to visit upon him the consequences of his refusal to observe his master's directions, it surely is not required that it should have been obviously dangerous. It is quite sufficient to bar his recovery if he knew that his method was a dangerous one, and chose to do his work in that way rather than in the manner pointed out by his master. Why should the danger be obvious if he had knowledge of it? If it had appeared that obedience to his master's orders as to the manner of moving the truck was obviously dangerous, he had a right to refuse to do the work; but even then he could not select another and dangerous way to do it, and charge his master with the consequence thereof, and especially if the danger of the method which he adopted was known to him at the time." *Whitson v.* (660) *Wrenn, supra.*

The other cases we have cited above are just as emphatic in announcing the doctrine, now become thoroughly well established, that if the servant chooses to do a thing he is not employed to do, the master owes him no legal duty, and if he is injured, especially if the act is a dangerous one, he must suffer the consequences of his wrong, for as to the particular act, not being within the scope of the service he was engaged to do, the law imputes the injury to his own wrong and not to any neglect of the master, who has directed him to do other things, or not to do his work in the way he has adopted. The principle more strongly applies where the dangerous act which injures him has been forbidden by his employer to prevent injury to him or others. "Persons on railroad tracks are bound to apprehend that locomotives may be swiftly approaching at any time, and are bound to be continually on the watch for them and to leave the track in season to avoid collision with them." *Copp v. R. R.*, 100 Me., 568. That is our doctrine, also, as it has been so often stated and very recently reiterated. This unfortunate accident would not have occurred had the intestate not have trespassed upon the track and subjected himself to constant and great danger, or had not violated instructions. This is the dominant cause of his injury; but whether so or not, it was an active and efficient cause operating up to the very moment of the collision, and his was exactly the same kind of negligence as he imputes to defendant, in one respect—the absence of lights or other signals; but his negligence was aggravated by the fact that he was violating orders, while the engineer was not, but was acting in the regular and normal performance of his duty. It would be a very strange conclusion if the defendant could be charged with liability for an accident resulting from the misconduct of the intestate, which was begun, continued, and ended through his own negligence, bringing upon him, by his own fault, the disastrous consequences.

We may add that if plaintiffs' evidence discloses that intestate was the author of his own injury, or that his negligence caused it proximately, either by itself or by concurring with that of some other person, a nonsuit is proper, as he thus proves himself out of court. This is settled by the cases already cited, as well as by *Neal v. R. R.*, 126 N. C., 634; *Royster v. R. R.*, 147 N. C., 347; *Wright v. R. R.*, 155 N. C., 329; *Fulghum v. R. R.*, 158 N. C., 555; *Thompson v. Construction Co.*, 160 N. C., 390; *Dunnevant v. R. R.*, 167 N. C., 232.

It is suggested in the opinion of the Court, but not conceded, that the validity of the nonsuit depends upon the contributory negligence of the intestate. In one sense his negligence was contributory, as it helped to cause his death; but upon the facts of this case, it was, at least,
(661) concurring at the very time of this collision between the engine and the lever-car.

The authorities cited in the opinion of the Court are not applicable to the facts of this case. In *Heavener's case,* 141 N. C., 245, the jury found that the plaintiff had looked and listened, and was free from negligence, the decision being confined practically to defendant's negligence, of which there was some evidence. The boy, in *Shepherd v. R. R.*, 163 N. C., 520, had the right to cross the track on his way home, and was guilty of no negligence, the decision turning, as in *Heavener's case,* upon whether there was evidence of the defendant's negligence. The same may be said of *Griffin v. R. R.*, 166 N. C., 624, as it presented the question of the defendant's negligence, with this further fact, which distinguishes it from our case, that the intestate was "drunk and down," and not able to take care of himself. The negligence of the helpless man upon a track is a fact accomplished and passed, and the force of his negligence is fully spent, and therefore the duty is imposed upon defendant to look out and care for him. *Justice Hoke* said in *Sawyer v. R. R.*, 145 N. C., 24, that "Although the plaintiff, in going on the track, may have been negligent; when he was struck down and rendered unconscious by a bolt of lightning, his conduct as to what transpired after that time was no longer a factor in the occurrence." But this is not so where the person injured is in the possession of his faculties and able to care for himself, and continues to be actively negligent down to the very moment of the injury. This clearly presents a case of concurring negligence under the principle laid down by *Justice Hoke* in *Watts v. R. R., supra,* and unanimously adopted by this Court.

The rules of the company were introduced without objection, and were treated as authentic. They provided that "hand- or push-cars must not be used except in the company's business, and never after dark, except by special authority of the roadmaster. Neither will they be allowed on the track in cloudy or foggy weather, when objects half a

mile distant cannot be distinctly seen." The plaintiff continuously violated this rule, to the very last. It will be seen that the rule requires that in cloudy or foggy weather, when objects cannot be distinctly seen half a mile distant, the hand-cars shall not be run at all. The plaintiffs' evidence shows that it was dark, the weather was thick and foggy, and an object could not be seen half a mile away. According to his testimony, the engine, a large object, was not seen until it was right at them, although the track was straight for 5 miles each way. We know, besides, that an engine has some light about it, as it must have fire in order to run. The hand-car had no light at all, and was a much smaller object.

But apart from this view of the case, the act of going on the track, as we have said, in the night, with a hand-car, without any light or signal, and during a fog, was itself negligence, as any prudent (662) man, or even a reckless one, should have known that it was exceedingly dangerous. If the engineer had been injured, and had sued G. W. Horne, the section foreman, or if the railroad company had sued for the damage to its engine, could there be any doubt as to the negligence of the intestate?

Tyson v. R. R., 167 N. C., 216, cited by the Court in its opinion, was another case of a drunk and helpless man upon the track, and in *Cullifer's case,* 168 N. C., 311, also cited by the Court, the second issue as to the plaintiff's negligence was not answered, and, besides, the plaintiff was exercising a right she had to cross the track, and the negligence consisting in failing to look and listen before going upon the track had spent its force, and her horse backed while on the track, and reared and pranced in full view of those on the approaching engine, and could have been seen in time to prevent the injury. It was not a case of concurring negligence, but of proximate cause. In *McNeill's case,* 167 N. C., at page 396, also cited by the Court, *Justice Allen* says: "It is not the absence of the headlight, nor the impact of the train, which determines the liability, but the impact of the train brought about by or as the proximate result of the absence of a headlight." But there can be no such proximate cause here, if the intestate's negligence was continuously active, and united with that of defendant, at the very moment of the injury, to produce it, and the joint negligence, therefore, was its proximate cause. Decisions of this Court, like the charge of the judge, and also like wills, deeds, and other instruments, should be considered with reference to their particular facts and as an entirety, with strict attention, of course, to the whole record, and when thus viewed, they fully sustain my conclusion.

BROWN, J., concurs in dissenting opinion of WALKER, J.

Cited: Smith v. Electric R. R., 173 N. C. 493 (g); *Horton v. R. R.*, 175 N. C. 485 (j); *Haynes v. R. R.*, 182 N. C. 681 (g); *S. v. Fulcher*, 184 N. C. 665 (b); *Nowell v. Basnight*, 185 N. C., 148 (g); *Davis v. R. R.*, 187 N. C. 153 (b); *Hudson v. R. R.*, 190 N. C. 118 (Concurring Opinion g); *Barnes v. Utility Co.*, 190 N. C. 388 (p); *Boswell v. Hosiery Mills*, 191 N. C. 558 (b); *Talton v. R. R.*, 191 N. C., 823 (g); *Franklin v. R. R.*, 192 N. C. 719 (g); *Elder v. R. R.*, 194 N. C. 620 (b); *Owens v. R. R.*, 207 N. C. 857 (b); *Hayes v. Telegraph Co.*, 211 N. C. 194 (g); *Smith v. Sink*, 211 N. C. 727 (b); *Godwin v. R. R.*, 220 N. C. 285 (b); *Bailey v. R. R.*, 223 N. C. 247 (b).

S. W. WEBB v. THE VIRGINIA-CAROLINA CHEMICAL COMPANY.

(Filed 12 January, 1916.)

1. Nuisance—Permanent Damages—Test.

Upon the question of whether a plaintiff is permitted at his election to recover the entire damages to his lands, past, present, and prospective, in one action, for nuisances and wrongs of like character, the test is whether the whole injury results from the original wrongful act or the wrongful continuance of the state of facts produced by these acts: that is, whether the wrongful act is single and entire, though causing subsequent and continuous injury, or whether a defendant wrongfully continues and maintains the conditions which result in continued or recurring damages.

2. Nuisance—Public Rights—Permanent Damages—Private Owner.

Permanent damages to the land arising from the commission of a nuisance or wrongs of like character are allowable where the rights of the defendant, whose acts cause the nuisance, are modified by the presence of a superior interest arising to the public, as in instances of *quasi*-public corporations having right of eminent domain; but not where the alleged injury arose from the acts of a private owner.

3. Same—Fertilizer Plant—Private Owner—Successive Actions.

The manufacture of fertilizers is not a nuisance *per se*, and whether it is such depends upon its situation, environment, and the manner in which it is being operated; and when there is nothing to show that such manufacture is objectionable as a public nuisance, the action is strictly one in adjustment of private rights. and the plaintiff is confined in his suit to a recovery of damages in successive actions, the same to be estimated up to the time of the trial, if the nuisance continues.

4. Nuisance—Private Owner—Abatement.

Where it appears in an action for damages for the maintenance of a nuisance that it is one in adjustment of private rights and not one in

which permanent damages may be awarded, the court may, if the facts and circumstances justify it, order an abatement.

APPEAL by plaintiff from *Daniels, J.*, at November Term, 1914, (663) of DURHAM.

Plaintiff alleged and offered evidence tending to show that he was the owner of several residential houses in East Durham, N. C., in the vicinity of the guano factory of defendant company and, for a period occupied one of them as his home; that for some time prior to the institution of the action defendant, in the operation of the said factory, had maintained an actionable nuisance, and particularly in the use and management of certain sulphuric acid chambers, and, by reason of continuous offensive and harmful odors proceeding therefrom, great wrong and injury was done to plaintiff; that defendant began the operation of its sulphuric acid chambers on 21 June, 1911, and the present action was commenced on 9 December, 1912.

There was allegation also on part of plaintiff that, by reason of the maintenance of said nuisance, the property of plaintiff was greatly depreciated in value and permanent damage done plaintiff as owner and occupant of the same, and plaintiff tendered an issue and offered evidence in support of his claim in that aspect, which was rejected, and plaintiff duly excepted.

Defendant denied the maintenance of any nuisance, contending further that in any event the injury, if any, caused by the operation of the factory was not one for which the entire damage could be recovered in one action at plaintiff's election.

On issues submitted, the jury rendered the following verdict:

1. Is the plaintiff the owner and in possession of the property described in the complaint? Answer: "Yes."

2. Has plaintiff's property been damaged by the wrongful acts (664) of the defendant, as alleged in the complaint? Answer: "No."

3. What damages, if any, is the plaintiff entitled to recover up to the commencement of this action? Answer: .....

Judgment on verdict for defendant, and plaintiff excepted and appealed, assigning for error, chiefly, that the issue as to permanent damages was refused, and the evidence offered to sustain it was excluded.

Manning, Everett & Kitchin for plaintiff.
Bryant & Brogden, Fuller & Reade for defendant.

HOKE, J. In actions to recover damages for nuisances and wrongs of like character, when the cause of the injury is of a permanent nature, the true test by which to determine the right of plaintiff, at his election,

to recover his entire damages, past, present, and prospective, in one action, has been said to depend on "whether the whole injury results from the original wrongful act or from the wrongful continuance of the state of facts produced by these acts." In other words, whether the wrongful act is single and entire, though causing subsequent and continuous injury, or whether a defendant wrongfully continues and maintains the conditions which result in continued or recurring damages. In this connection it has been further said that the entire damages may be recovered when the "source of the injury is permanent in its nature and will continue to be productive of injury independent of any subsequent wrongful act." *Mast v. Sapp,* 140 N. C., 533; *Ridley v. R. R.,* 118 N. C., pp. 996-997; *Troy v. R. R.,* 23 N. H., 83; *Hargreaves v. Kimberly,* 26 W. Va., 787; *R. R. v. Mihlman,* 17 Kan., 224; *Mayor v. Comer,* 88 Tenn., 415, 7 L. R. A., 465; 21 A. and E. Enc., pp. 732-733; 1 Sedgwick on Damages (9 Ed.), secs. 91-94, inclusive; Hale on Damages, p. 82.

In some cases on this subject it has been held that, when one erects a substantial building or other structure of a permanent character on his own land which wrongfully invades the rights of an adjoining proprietor by the creation of a nuisance or trespass, the injured party may "accept or ratify the feature of permanency and sue at once for the entire damage. *Chicago Forge and Bolt Co. v. Sanche et al.,* 35 Ill. App., 174. But in cases strictly of private ownership the weight of authority seems to be that separate actions must be brought for the continuing or recurrent wrong, and plaintiff can only recover damages to the time of action commenced. In this State, however, to the time of trial. *Ridley v. R. R.,* 118 N. C., 996, *supra; Adams v. R. R.,* 110 N. C., 325; *Aldwood v. City,* 153 Mass., 53; *Mayor v. Nashville, supra; Brewing Co. v. Compton,* 142 Ill., 511; *Schloss, etc., Iron and Steel Co. v. Mitchell,* 161 Ala., pp. 278-286.

(665) The privilege, however, of allowing an entire recovery for an injury caused by structures of a permanent kind has, in numerous decisions here and elsewhere, been extended to either party when their continued maintenance is protected by the existence of a *quasi*-public franchise in the holder or other circumstances presenting a case where the private right must, to that extent, be subordinated to the public good. *Rhodes v. Durham,* 165 N. C., pp. 679-680, a case of city *sewage; Ridley v. R. R., supra; Adams v. R. R., supra; Watts v. R. R.,* 39 W. Va., 196, cases of railways; *Harper v. Lenoir,* 152 N. C., pp. 723-728, case of public streets; *Grier v. Water Co.,* a case of city waterworks; Wood's Mayne on Damages, sec. 110. And, in such cases, on payment of the damages awarded, the wrong-doer acquires an easement to maintain the conditions presented, to the extent that the same is properly exercised;

a position made peremptory with us by statute, in cases of railways, Revisal, sec. 394.

In *Rhodes' case, supra,* this principle is stated as follows: "Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement."

In the West Virginia case, 39 W. Va., *supra,* it is held: "If the cause of injury is in its nature permanent, and a recovery for such injury would confer a license on defendant to continue it, the entire damages may be recovered in a single action," etc.

And in Wood's Mayne on Damages, in section 110, it is said: "In cases, too, of nuisances and continued trespasses upon land, as each instant the nuisances of trespass is continued is a fresh ground of action, it is clear the jury cannot give damages beyond the commencement of the existing suit. Where, however, the original act was itself a trespass, but is done by a person or body who are protected by statute from any suit for anything done under these powers, unless brought within a particular time after the act done, no suit can be brought for any continuance of the trespass, nor for any consequential damages resulting from it, after the period of limitation. It would follow, then, that damages in the first action ought to constitute a full satisfaction for any injury that could reasonably and naturally spring from it," etc.

A good deal of the confusion alluded to by this author as prevailing on this subject (see Wood's Mayne on Damages, sec. 111) will be found to grow out of the fact that in many of the cases on the subject the judges delivering the opinions were not called on to note the dis- (666) tinction existent where the injury arose from the act of a private owner and cases where the private right is properly modified by the presence of a superior interest arising to the public. But, in any view of this subject, his Honor was clearly right in holding that this was not a case permitting, at the election of plaintiff, an award of permanent damages.

It has been held that a factory of this character is not a nuisance *per se,* but that it is properly made to depend upon its situation, environment, and the manner in which it is being operated. *Duffy v. Meadows,* 131 N. C., 31, and the case presented, so far as this record discloses, is one strictly in adjustment of private rights, and, under the principles of any of the cases cited, the plaintiff is confined in his suit to a

recovery of damages in successive actions. In many of the decisions on the subject it will be found that this recovery, in any one action, is limited to the time of action commenced, and that was the rule at common law, but, in our State, as stated, this rule has been so far modified that damages may be awarded to the time of trial if the nuisance continues to that time. This last was the rule obtaining in courts of equity where one purpose of the suit was to procure an abatement, and in this jurisdiction, where courts of law and equity have been combined into one and the same tribunal, we see no reason why, if the facts and circumstances justify it, there should not be an abatement ordered. Instructive cases on this power of abatement will be found in *Brown v. R. R.*, 83 N. C., 128; *Privett v. Whitaker*, 73 N. C., 554; *Hyatt v. Myers*, 71 N. C., 271.

On careful consideration of the record, we find no error in denying to plaintiff an award of permanent damages or in refusing to try the case on that theory, and the judgment of the Superior Court is therefore affirmed.

No error.

Cited: Mason v. Durham, 175 N. C. 642 (2g); *Barcliff v. R. R.*, 176 N. C. 41 (2p); *Morrow v. Mills*, 181 N. C. 426 (3f); *Jackson v. Kearns*, 185 N. C. 420 (1f, 3g); *Langley v. Hosiery Mills*, 194 N. C. 646 (2q); *Winchester v. Byers*, 196 N. C. 385 (3f); *Wharton v. Mfg. Co.*, 196 N. C. 721 (3f); *Lightner v. Raleigh*, 206 N. C. 504 (3f); *Aydlett v. By-Products Co.*, 215 N. C. 702 (2q); *Bruton v. Light Co.*, 217 N. C. 7 (2b).

A. M. KISTLER v. SOUTHERN RAILWAY COMPANY.

(Filed 2 October, 1914.)

Appeal and Error—"Moot Case"—Intoxicating Liquors—Carriers of Goods.

The purpose of this action being to determine the question whether the plaintiff, the consignee of a keg of beer, transported by the defendant carrier from beyond the State, is entitled to receive it in North Carolina; and it further appearing from the briefs filed that both the parties to the suit are interest on the same side of the controversy, and that the State and Federal statutes require interpretation: *Held*, the case is practically a "moot case," which, under the circumstances, the Court will not decide.

[The following *per curiam* opinion in *A. M. Kistler v. Southern Railway* was rendered by the Supreme Court 29 October, 1913. The motion of defendant to reinstate the case for argument was allowed 18 November, 1913, and the case set for hearing at February Term, 1914, and accordingly argued 5

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February, 1914. The case went over under *advisari* to Fall Term, 1914, and a *per curiam* order dismissing motion to reconsider was filed 7 October, 1914,

WALKER and ALLEN, JJ., dissenting. By inadvertence the opinion was not published in the 168 N. C.]

APPEAL by defendant from *Cline, J.*, at June Term, 1913, of (667) BURKE.

Action to recover one barrel of beer consigned to the plaintiff, and heard upon an agreed statement of facts. There was judgment in favor of the plaintiff, and the defendant excepted and appealed.

W. A. Self for plaintiff.
S. J. Ervin for defendant.

PER CURIAM. This is a proceeding to obtain a determination of the question whether the defendant can legally transport a barrel of beer from a point beyond the State to Morganton, N. C., and there deliver it to the plaintiff. The plaintiff files a brief contending that chapter 24, sec. 3, Laws 1907, forbidding such act, and the act of Congress ratified 3 March, 1913, cannot deprive him of the right to receive such consignment. The defendant, in his brief, avers that he is ready to obey the law if he knows what it is, and files a brief in accordance with the contention of the plaintiff. It is apparent that both parties are interested on the same side, and that this is really a proceeding to ask the advice or opinion of the Court on practically a "moot case," when there is no doubt as to the facts. There was no stay of execution, and the beer was doubtless delivered and long since consumed.

In *Parker v. Bank,* 152 N. C., 255, this Court held that the object of the suit was evidently to procure a construction of section 4, ch. 150, Laws 1909, and that it was instituted solely for the purpose of obtaining the opinion of the Court, and dismissed the action. That case referred to *Blake v. Askew,* 76 N. C., 327, in which it was attempted in a similar way to obtain the opinion of the Court as to the validity of special-tax bonds, and where the same action was taken. In this case it would be necessary to construe the above statutes of the State and of the United States, and we are not willing to pass upon a question of such importance without the benefit of a *bona fide* controversy and full argument by opposing counsel. The Court has refused to entertain a controversy submitted to obtain the opinion of the Court upon the administration of the public school system (*Board of Education v. Kenan,* 112 N. C., 567), or to advise a sheriff as to the application of moneys (*Milliken v. Fox,* 84 N. C., 107; *Bates v. Lilly,* 65 N. C., 232).

We must, therefore, enter an order,

Appeal dismissed.

(668)

PAUL H. KILPATRICK v. J. R. HARVEY ET ALS.

(Filed 13 October, 1915.)

1. Injunction—Appeal and Error—Act Committed—Appeal Dismissed.

On appeal in an action to restrain the foreclosure of a mortgage, with power of sale, on the ground that the defendant induced the plaintiff to execute it when the latter was too intoxicated to have knowledge at the time of what he was doing, and it appears that the sale of the land was made pending the appeal after the restraining order had been dissolved and no stay bond given, the Supreme Court will dismiss the appeal, the act complained of having been committed and there being nothing upon which the injunction could operate.

2. Injunction—Appeal and Error—Appeal Dismissed—Mortgage Sale—Pleadings—Lis Pendens—Cause Retained—Practice.

Where a restraining order for the sale of land under mortgage has been dissolved, a sufficient complaint filed before the sale operates as *lis pendens* to the purchaser, and affects him with notice of the plaintiff's rights, as to which the cause will be retained.

APPEAL by plaintiff from *Connor, J.*, at March Term, 1915, of PITT. Appeal from an order dissolving a restraining order.

Albion Dunn for plaintiff.
F. G. James & Son for defendants.

PER CURIAM. The plaintiff sought to enjoin the sale of his property under a mortgage containing a power of sale and securing a note to the defendants in the sum of $1,200. The ground upon which the plaintiff sought to enjoin the sale was that he was intoxicated at the time of the execution of the mortgage, so much so that he had no knowledge of what he was doing, and that the defendants took advantage of his intoxicated and incapable condition to secure the execution of the instrument upon the part of the plaintiff. The judge below, when hearing the matter, dissolved the restraining order which had theretofore been issued. Thereupon the defendants executed the power of sale and the plaintiff's land was sold.

It is well settled that where the act sought to be enjoined has been committed, this Court will not direct the issuing of an injunction, for the reason that there is nothing for the injunction to operate upon. To illustrate: in *Harrison v. Bryan,* 148 N. C., 315, the plaintiff sought to enjoin the cutting down of a tree. The judge below dissolved the injunction; plaintiff appealed. Pending the appeal, the tree was cut down. It was manifest that the injunction would be abortive, and the Court would not do a vain thing.

Again, it is held in *Moore v. Monument Co.*, 166 N. C., 212, "That the correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought (669) to be restrained has already been committed."

For these reasons the appeal in this case must be dismissed. But this does not dismiss the action or affect its merits. It was stated upon the argument that the complaint in this case was filed before the sale, and that is evident, as the complaint must have been filed when the restraining order was dissolved. If so, it would constitute a *lis pendens*. If the plaintiff, as he claims, gave notice of his rights at the sale, the purchaser would be affected thereby, and, if necessary, the plaintiff could make the purchaser a party to this action. We will say in this connection that where the act sought to be enjoined is of such character that the commission of it will be irremediable, the injunction ought not to be dissolved unless in a very plain case. It is best that the *status quo* of the parties be preserved until their rights upon an appeal can be determined by this Court

Upon the affidavits appearing in this record, the injunction might well have been continued until the final hearing.

Appeal dismissed.

Cited: Edwards v. Comrs., 183 N. C. 61 (1f); *Griffith v. Board of Education*, 183 N. C. 409 (1f); *Boyd v. Brooks*, 197 N. C. 648 (1f); *Board of Education v. Comrs. of Johnston*, 198 N. C. 431 (1f); *Rousseau v. Bullis*, 201 N. C. 13 (1f); *Efird v. Comrs. of Forsyth*, 217 N. C. 692 (Cited erroneously as *Howerton v. Scherer*, 1f); *Swink v. Horn*, 226 N. C. 719 (1d).

J. F. HOWERTON v. H. SCHERER & CO.

(Filed 3 November, 1915.)

Appeal and Error—Broadside Exceptions.

In an action to recover a balance of salary alleged to be due by contract, an exception to the judge's charge that he failed to properly instruct the jury as to the weight and effect of the contract is held to be a broadside exception which the Supreme Court will not consider on appeal.

APPEAL by defendant from *Cooke, J.*, at April Term, 1915, of DURHAM.

Civil action, tried upon these issues:

1. Is the defendant indebted to the plaintiff, as alleged? If so, in what amount? Answer: "$300."

2. Is the plaintiff indebted to the defendant by way of counterclaim, as alleged? If so, in what amount? Answer: "Nothing."

The defendant appealed.

W. L. Foushee for plaintiff.

Sykes & Sheppard for defendant.

PER CURIAM. This action was brought to recover from the defendants the sum of $345, with interest, alleged to be due for the balance of the salary and traveling expense which the defendants are alleged to (670) have contracted to pay the plaintiff. There are no exceptions to the evidence, and the matter seems to be almost exclusively of fact. The defendant assigns error "to the failure of his Honor to properly instruct the jury as to the weight and effect of the contract introduced in the evidence." This is a broadside exception, and under our rulings need not be considered by us. Nevertheless, we have examined the charge, and think that his Honor fully complied with the law in the absence of any request for special instructions. If fuller instructions had been desired, they should have been asked for. *Ives v. R. R.*, 142 N. C., 131.

No error.

FITZGERALD COTTON MILLS v. HOLT, GANT & HOLT COTTON MANUFACTURING COMPANY.

(Filed 24 November, 1915.)

Contracts—Warranty—Breach—Pleadings—Evidence—Variance.

Where the defendants set up a breach of warranty in an action upon contract to deliver a certain number of pounds of "14 single cotton warps" at a certain price per pound, and there is no evidence of express warranty, and the defendant admits the delivery and use of the "warps," evidence only tending to show unskilled workmanship in the manufacture of the "warps" and defects in their quality, without claim that they were worthless, does not support the allegation in the answer, and the counterclaim will be disallowed as a matter of law. *Robinson v. Huffstetler*, 165 N. C., 459, cited and applied.

APPEAL by defendant from *Lyon, J.*, at May Term, 1914, of GUILFORD.

Action to recover the purchase price of certain cotton warps sold by the plaintiffs to the defendant, in which the defendant sets up a counterclaim on account of an alleged breach of warranty.

The warranty alleged in the answer is as follows: "That the plaintiff and the defendant entered into a contract on or about 13 December, 1913,

by which the plaintiff was to deliver to the defendants at Glen Raven, their factory near Elon College in Alamance County, in the State of North Carolina, 50,000 pounds of 14 single cotton warps at 21¼ cents per pound; that the said cotton warps were to be delivered to the defendants in installments."

There was evidence on the part of the defendant of unskillful workmanship in the manufacture of the warps, and of defects in their quality, but no evidence that they were not "14 single cotton warps" or that they were worthless.

The defendant used the warps from time to time and paid for all except the last shipment.

The jury answered the issue on the counterclaim in favor of the (671) defendant, and his Honor set aside the finding as matter of law, and rendered the following judgment:

This cause coming on to be heard at the May Term, 1915, of the Superior Court of Guilford County, before his Honor, C. C. Lyon, judge, and a jury, and being heard, and the jury having answered the issues submitted as follows:

1. Is the defendant indebted to plaintiff? If so, in what amount? Answer: "Yes; $411.31, with interest from 28 February, 1914."

2. Is the plaintiff indebted to the defendant on counterclaim? If so, in what amount? Answer: "$225."

On motion of counsel for plaintiff, the court set aside the jury's finding as to the second issue, on the ground that the pleadings and evidence were not sufficient to support a breach of warranty, and rendered judgment for plaintiff on the first issue, as follows: It is hereby ordered, adjudged, and decreed that the plaintiff, the Fitzgerald Cotton Mills, recover judgment of the defendant, the Holt, Gant & Holt Cotton Manufacturing Company, in the sum of $411.31, with interest thereon from 28 February, 1914, and for the costs of this action, to be taxed by the clerk.

C. C. LYON,
Judge Presiding.

The defendant excepted and appealed.

Alfred S. Wyllie for plaintiff.
John A. Barringer for defendant.

PER CURIAM. The evidence offered by the defendant tending to prove a breach of warranty does not support the allegations of the answer, in which it is not alleged that there was a breach of warranty as to workmanship or quality, and as the defendant used the warps, the case is con-

trolled by *Parker v. Fenwick,* 138 N. C., 209, and *Robinson v. Huffstetler,* 165 N. C., 459.

No error.

MORROW BROTHERS & HEATH COMPANY v. H. F. STARR AND H. C. PATTERSON.

(Filed 24 November, 1915.)

Mechanics' Liens—Materials Furnished — Defendant's Consent —Instructions.

In this action to enforce a lien for material furnished in the construction of the defendant's house, the affirmative answer by the jury on the first issue, as to the indebtedness of the plaintiff and the amount, is held controlling upon the question of a lien therefor, the evidence being conflicting, and the judge having instructed the jury to answer the issue in the negative if the defendant had not consented to the purchase of the materials.

(672) APPEAL by defendant Patterson from *Devin, J.,* at March Term, 1915, of STANLY.

Civil action tried upon these issues:

1. Is the defendant H. C. Patterson indebted to the plaintiff, and if so, in what amount? Answer: "Yes; $347.95, with interest added."

2. Is the defendant H. F. Starr indebted to the plaintiff, and if so, in what amount? Answer: "No."

R. L. Smith for plaintiff.

R. E. Austin and Jerome & Jerome for defendant.

PER CURIAM. This action is brought to subject the property of the defendant Patterson to a lien for material furnished. It is unnecessary to consider the various questions presented upon this phase of the case. His Honor specifically instructed the jury that if the defendant did not give his consent to have the material furnished by the plaintiff for the construction of the house charged to the defendant Patterson, to answer the first issue "No." This eliminates all questions relating to the lien under the statute.

There is abundant evidence introduced upon the part of the plaintiff that in order to complete his house the defendant Patterson became personally responsible for the plaintiff's debt. It is true, this is denied by the defendant. The matter was submitted to the jury fairly and correctly, and we find

No error.

ETHELYN GARSED v. E. T. GARSED.

(Filed 1 December, 1915.)

1. Divorce a Mensa—Pendente Lite—Alimony—Attorney's Fees—Allegation—Proof.

In order to entitle the wife to alimony and counsel fees *pendente lite* in her action for divorce, she must allege the statutory grounds for a divorce of this character (Revisal, sec. 1562), and show one of them with her evidence; and to entitle her to a divorce on the ground of indignities to her person or conduct rendering her life intolerable, this must appear. It is not sufficiently shown when it appears that no physical violence has been offered her, but that each had used violent language to the other, without it appearing whether she had offered him sufficient provocation therefor. In this the case the question whether the plaintiff was justifiable in voluntarily leaving home was a question for the jury, and it is held that the order of the judge allowing her alimony and attorney's fees was improvidently entered.

2. Appeal and Error—Substantial Rights—Alimony—Attorney's Fees—Pendente Lite—Interpretation of Statutes.

An appeal from an order allowing alimony and counsel fees to the wife *pendente lite* is permitted under the general laws regulating appeals (Revisal, sec. 587), making it unnecessary to bring section 15, ch. 39, Revised Code, forward, specially permitting appeals in such cases.

APPEAL by defendant from *Webb, J.*, at chambers in Charlotte, (673) 27 October, 1915.

Stewart & McRae and T. A. Adams for plaintiff.
Cansler & Cansler for defendant.

PER CURIAM. This is an appeal from an order allowing the plaintiff alimony and counsel fees *pendente lite* in an action for divorce from bed and board. The grounds for such divorce are set out in Revisal, 1562. The defendant did not either (1) abandon his family, nor (2) turn his wife out of doors, nor (3) by cruel or barbarous treatment endanger the life of the plaintiff, nor (4) become an habitual drunkard.

The only other ground set out in Revisal, 1562, is : "(5) Shall offer such indignities to the *person of the other* as to render his or her condition intolerable and life burdensome." The complaint does not allege that the defendant struck the plaintiff or offered her any physical violence, or threatened to do so, as in *Green v. Green,* 131 N. C., 533, and *Erwin v. Erwin,* 57 N. C., 82. It is neither alleged nor found that the specific allegation as to the treatment of the plaintiff by her husband was without sufficient provocation on her part, and therefore the com-

plaint is defective. *Jackson v. Jackson,* 105 N. C., 433; *O'Connor v. O'Connor,* 109 N. C., 139.

In *White v. White,* 84 N. C., 340; *McQueen v. McQueen,* 82 N. C., 471; *Ladd v. Ladd,* 121 N. C., 119; *Dowdy v. Dowdy,* 154 N. C., 558; *Page v. Page,* 161 N. C., 175, it is held that the complaint must aver, and facts must be found upon which it can be seen, that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. It is true that the court finds (as the complaint avers) that the defendant cursed and used abusive epithets, though he did not offer to strike her; but the defendant avers that his wife cursed him and struck him, and she admits the latter charge and the judge so found. There were also allegations in the answer and findings of fact from which it can be seen that both parties were guilty of bad temper and bad language, and that the wife was extravagant, and did not regard her husband's wishes, and was guilty of conduct calculated to irritate him. He did not drive her from his home, but she voluntarily left because the relations between them had become unpleasant. Whether her doing so was justifiable or not is a matter for the jury upon the trial of the issues. It does not appear upon these findings that she was sufficiently free from fault to justify the allowance of alimony before trial as the case now stands.

It may be, as was said in *Page v. Page,* 161 N. C., 175, "if the plaintiff will exercise a little more self-control and forebearance and perform her household duties as becomes a dutiful wife and exhibit a little
(674) more consideration for her husband and real affection for him, the present distressing situation will soon be changed, if not reversed, and her home and her life will become brighter and happier.

The plaintiff contends that an appeal does not lie from an order allowing alimony *pendente lite.* It is true that this was held, *Earp v. Earp,* 54 N. C., 118; but this was changed by Revised Code, sec. 15, ch. 39; *Morris v. Morris,* 89 N. C., 112. This has been reaffirmed since in *Moore v. Moore,* 130 N. C., 333, and in *Barker v. Barker,* 136 N. C., 320. The plaintiff contends that Revisal, 1566, does not contain the authority to appeal that was given by Revised Code, ch. 39, sec. 15; but the last two cases were decided under the general law regulating appeals, Revisal, 587, and it was unnecessary to continue the former special authority given in the Revised Code, above cited, in such cases.

As the plaintiff could not readily give bond, doubtless it would be a complete loss to the defendant to pay alimony during a litigation which could be prolonged by the plaintiff, if at the trial on the merits the facts were found by the jury in favor of the defendant. It is, therefore, one of those cases in which the judgment, though not final, "affects a substantial right" and entitles the defendant to have the order reviewed.

Upon the evidence and the facts as found by the court, the order was improvidently granted, and must be

Reversed.

Cited:Easeley v. Easeley, 173 N. C. 531 (1f); *White v. White,* 179 N. C. 603 (1j); *Moore v. Moore,* 185 N. C. 334 (1b); *Horton v. Horton,* 186 N. C. 333 (1f); *Davidson v. Davidson,* 189 N. C. 628 (1f); *McManus v. McManus,* 191 N. C. 742 (1f); *Trull v. Trull,* 229 N. C. 198 (1d).

WADSWORTH LAND COMPANY v. CHARLOTTE ELECTRIC COMPANY AND PIEDMONT TRACTION COMPANY, CONSOLIDATED WITH PIEDMONT TRACTION COMPANY, PETITIONER, v. WADSWORTH LAND COMPANY.

(Filed 1 December, 1915.)

1. Instructions—Railroads—Condemnation—Measure of Damages—Statement of Contentions.

Where the court substantially instructs the jury in condemnation proceedings for railroad purposes that the measure of damages is the difference between the market value of the land before and after its appropriation for a right of way, it will not be considered as error that, in stating the contentions of the parties, he said more or less about the value of the land for residential, municipal, and industrial purposes.

2. Trials—Railroads—Condemnation—Argument—Damages—Speculative Values—Appeal and Error.

Argument of counsel on speculative values for the lands taken for railroad purposes in condemnation proceedings will not be considered as ground for reversible error on appeal when it appears that the trial court, at the time of the objection, corrected any erroneous impression they may have made on the jury and afterwards instructed them not to consider anything not based on the evidence in the case relating thereto.

3. Appeal and Error—Objections and Exceptions—Unanswered Questions.

The exclusion of evidence tending to show the right of the defendant electric company to haul freight over its lines, in these proceedings upon the question of damages recoverable by the owner of lands for a right of way condemned thereover, was proper under the former decision in this case. 162 N. C., 504.

4. Issues—Condemnation—Special Benefits.

In these proceedings to assess damages to the owner of lands for a right of way taken in condemnation proceedings, it is held that the issue submitted was sufficient to include any special benefits claimed by the defendant to inure to the lands, and the charge gave the defendant the full benefit thereof.

5. Condemnation—Railroads—Measure of Damages—Unsightly Construction—Evidence.

The exception to the charge of the court in this case allowing damages to the land assessed for a right of way on account of the unsightliness of the street railway construction thereon is not sustained on appeal.

6. Instructions—Railroads—Condemnation—Character of Lands—Appeal and Error.

It was correct for the judge to refuse to charge that the land over which the defendant railway company had condemned a right of way was unsuitable for high-class residential development, under the evidence in this case.

(675) APPEAL by Piedmont Traction Company from *Lane, J.*, at May Term, 1915, of MECKLENBURG.

These two actions were consolidated and tried together upon this issue: What damages, if any, shall the Piedmont Traction Company be required to pay the Wadsworth Land Company as compensation for the condemnation of the right of way described in the traction company's amended petition? Answer: "$20,000."

From the judgment rendered, defendant the Piedmont Traction Company appealed.

Tillett & Guthrie, J. W. Keerans, Cansler & Cansler for plaintiffs.

Osborne, Cocke & Robinson, Pharr & Bell, John M. Robinson for defendant.

PER CURIAM. The only questions presented on this appeal arise upon the one issue of damages. The Piedmont Traction Company seeks to condemn a right of way for its railroad through the plaintiff's land. At a former trial the plaintiff recovered a judgment for $35,000, and upon appeal to this court a new trial was ordered. 162 N. C., 504. Upon the last trial the damages were assessed at $20,000. There seems to have been taken a very large number of exceptions which have been reduced to eighty-six assignments of error, and these in turn have been reduced to eleven points set out in the able and elaborate brief of counsel for defendant.

(676) 1. It is contended that the court erred in instructing the jury to estimate the damages to the plaintiff's property upon the basis of its use for the particular purpose of a high-class residential development, and in refusing to instruct the jury that the measure of damages was the difference in its market value before and after the taking for all purposes. This contention cannot be sustained. It is true, the court said more or less about the value of this property for residential purposes and also for municipal and industrial purposes, but a careful examina-

tion of the charge shows that that was largely in stating the contentions of both sides. The court instructed the jury substantially, so that they could not well have misunderstood what was said, that the proper measure of damages where lands are taken for railroad purposes is the difference between the market value of the land before and after its appropriation for a right of way. This is in accord with the former opinion in this case.

2. It is objected that his Honor erred in permitting counsel for the plaintiff, in arguing the case to the jury, to speculate as to the future uses to which the property might be put. In trying a case of this sort it is very difficult to prevent arguments that are not based solely upon the evidence. In this case the court did all it could in specifically instructing the jury to disregard any argument of counsel not based on the evidence, and this instruction was given at the time when the counsel for the defendant objected to such argument.

3. It is objected that the court erred in refusing to allow the traction company to show, and in refusing to charge the jury, that the electric company had the right to haul freight, under its contract with the Wadsworth heirs, over its property. It was expressly decided by this Court in the former appeal that if the electric company had the right to haul freight over the land, it could not transfer that right to this defendant. An examination of the contract between the electric company and the Wadsworth heirs fails to disclose that the Wadsworths conferred upon the electric company the right to run freight trains through the property. The last clause of the contract indicates that the railway system to be operated was a street car system, and that it was to be operated in connection with the street railway system for the city of Charlotte, and that the cars to be used thereon were to be similar to those used on the street railway of Charlotte.

4. It is contended that an issue tendered by the defendant in reference to special benefits should have been submittd to the jury. We think the defendant had ample opportunity to offer all the evidence bearing upon any special benefits claimed to inure to the property under the form of the issue as submitted. We think the court in the charge gave the defendant full benefit of its claim in this respect.

5. It is contended that the court should have charged the jury (677) that they had no right to take into consideration the unsightliness and depreciation of the value of the property in consequence of the traction company's poles and trolley wires. We think his Honor properly charged the jury in this respect and that there was evidence to the effect that the poles projected out into the street, and were unsightly and were a source of danger to persons, and would tend to decrease the value of the property generally.

6. It is contended that the court erred in refusing to charge the jury that the property of the land company was unsuitable for high-class residential development. This was a matter of dispute in the evidence and was properly submitted to the jury for their consideration as an element of value.

7. The defendant insists that it was seriously prejudiced by an unfair statement of the contentions of the parties, as given to the jury by the court. A careful reading of the charge of the court satisfies us that it is not justly amendable to this criticism.

The other four points discussed in the defendant's brief we do not think necessary to discuss. A careful examination of the voluminous record in this case, assisted as we have been by unusually full briefs, satisfies us that no substantial error has been committed which would justify us in ordering another trial of this case, which has been tried once before.

No error.

W. A. CANNON ET AL. *v.* COMMISSIONERS OF PENDER COUNTY.

(Filed 1 December, 1915.)

Appeal and Error—Injunction—Act Committed—Appeal Dismissed.

On appeal from an order dissolving an order restraining county commissioners from appointing county registrars and judges of election to conduct an election previously called, it was properly made to appear that the election had been held; and there being nothing before the court for it to determine, the appeal is dismissed.

APPEAL by plaintiffs from an order dissolving a restraining order, heard 27 September, 1915; from PENDER.

Appeal from judgment rendered dissolving a temporary restraining order issued by his Honor, *Rountree, J.*, enjoining the defendants, the board of county commissioners of Pender County, from appointing registrars and judges of election to conduct an election which had previously been called to be held 2 November, 1915.

The plaintiffs appealed.

(678) *Bland & Bland, C. E. McCullen for plaintiffs.*
John J. Best and H. L. Stevens for defendant.

PER CURIAM. It has been properly brought to the attention of the Court that since the pendency of this appeal here an election under the

statute for the purpose of determining whether the county shall continue a public fence has been held, and that the proposition failed to carry. There is nothing now before the Court to determine. To issue an injunction under the circumstances would be futile.

The appeal is dismissed.

R. L. HODGES v. F. W. RICHARDS ET ALS.

(Filed 15 December, 1915.)

Contract—Sales—Commissions on Collections—Reference—Evidence—Appeal and Error.

Where upon the report of a referee it appears that the plaintiff and defendant had contracted that the former should ship to the latter "galax," a known commodity of marketable value, for the latter to sell and remit the plaintiff moneys collected for such sales, less his part of the profits, and there is a conclusion of law charging the defendant with the full amount of the sales without evidence of the amount collected, an exception by the defendant to the confirmation of the report will be sustained on appeal, the defendant, under the terms of the contract, being chargeable only with the amount of sales collected, etc., and such as could have been collected by him by the exercise of ordinary diligence.

APPEAL by defendants from *Adams, J.*, at July Term, 1915 of AVERY.

Civil action heard upon exceptions to the report of a referee. His Honor overruled all the exceptions, affirmed and approved the findings of fact, and rendered judgment against the defendants for $598.45, with interest. The defendants appealed.

There was evidence tending to prove that in the mountains of Western North Carolina there growns in great abundance an evergreen plant known as galax, which has a marketable value. It is shipped in large quantities to the northern markets, where it has a ready sale. It was affecting this commodity that a contract was made between the plaintiff and defendants whereby the former was to buy, case, and deliver to the railroad all the galax that he might be able to get during the continuance of this contract, that is to say, from October, 1907, to May, 1908. Under this contract the plaintiff was to be paid first cost for the galax, and after all expenses were paid for advertising and losses sustained, the plaintiff was to have for his share two-thirds of the net profits, and the defendants one-third. It is admitted that the plaintiff was paid in full original cost of the goods bought, which was $1,273.27. The market value of the goods was $2,762.56. F. M. Richards (679)

testified that if there had been no loss and all accounts had been collected there would have been a profit of $1,114.73, going to both plaintiff and defendants according to the share of each under the contract. That after that he collected $200 and paid plaintiff $99.69 on his share of the profits; that left a balance due of $915.35 as profits when collected.

The plaintiff testified, among other things, that the defendants were to collect the accounts for sales and were to pay him when collected.

The account stated by the referee, which is the basis of the judgment against the defendants, is as follows:

(Account Stated.)

F. W. RICHARDS & Co. *to* R. L. HODGES, *Dr.*

Dr.	
Total amount of sales	$2,762.56
Cr.	
By loss due to damage, expenses, etc.	$ 445.83
By amount paid R. L. Hodges for cost price	1,273.27
	$1,719.10
Deduct from total sales as above	$2,762.56
Total credits, as above	1,719.10
Leaves total net profit	$1,043.46
Two-thirds of said net profit is	$ 659.64
Add cost of protest of check	2.50
	$ 698.14
By cash paid by defendants in December, 1908, on account	99.69
Leaves balance due plaintiff	$ 598.45

The defendants offered evidence tending to prove that they had been diligent in their efforts to collect the accounts charged against them in this statement of account and had been unable to do so. The exception principally relied on is that there is no evidence to sustain the findings of the referee.

L. D. Lowe and T. A. Love for plaintiff.

T. L. Lowe and J. W. Ragland for defendants.

(680) PER CURIAM. The exception of the defendant must be sustained because he has been charged with the amount of the accounts,

without regard to their collectibility, when all the evidence is to the effect that the plaintiff is only entitled to a proportionate part of the net profits, and the plaintiff himself testified that the defendants "were to collect and pay when collected."

If this is the contract, the account must be restated, charging the defendant with the sums collected and, in addition, with the uncollected accounts which could have been collected by the exercise of ordinary diligence.

Reversed.

THE MADDILLON ENGINE AND THRESHER COMPANY v. JAMES R. THOMAS.

(Filed 22 December, 1915.)

Appeal and Error—Assignments of Error—Rules of Court—Appeal Dismissed.

Assignments of error must conform to the rules of the Supreme Court on appeal, so that the Court can see what error, if any, has been committed; and upon failure to do so the Court may, of its own motion, dismiss the appeal.

APPEAL by defendant from *Cline, J.*, at May Term, 1915, of HAYWOOD.

Action to recover $300 due by note under seal executed by the defendant on 12 March, 1902, and payable on 1 January, 1903.

A credit of $50 is indorsed on the note of 12 September, 1913, but the defendant alleges that he was induced to make this payment by fraudulent representations, and he pleads the statute of limitations.

The jury found that the payment was made and that it was not induced by fraud.

There was a judgment in favor of the plaintiff, and the defendant appealed, assigning the following errors:

The defendant assigns as error his first exception, to that portion of his Honor's charge hereinbefore referred to as the first exception.

The defendant assigns as error as his second exception, to that portion of his Honor's charge hereinbefore referred to as the second exception.

Hannah & Leatherwood for plaintiffs.

M. Silver, Gilmer & Gilmer, and J. W. Ferguson for defendant.

PER CURIAM. The attention of the profession has been called several times to the importance and necessity of setting forth in the assignments

of error the grounds of the appeal, and that when this is not done the Court may of its own motion dismiss the appeal.

(681) The number of appeals and the size of the records are constantly increasing, and the Court cannot properly perform its duties unless this rule is complied with.

The assignments of error in this record furnish no information to the Court, and we cannot see from them what error, if any, has been committed, and the appeal is therefore dismissed.

We have, however, examined the record, and find that only two exceptions have been noted to parts of the charge, and there is no error in them.

Appeal dismissed.

Cited: Bridgers v. Griffin, 195 N. C. 864 (f); *Cecil v. Lumber Co.,* 197 N. C. 82 (f); *Poindexter v. Call,* 208 N. C. 63 (g).

MARGARET EVANS v. MARK BRENDLE.

(Filed 22 December, 1915.)

Appeal and Error—Remanding Cause—Disputed Facts.

In this controversy over a disputed title to lands, involving the identity of a grantor in certain deeds with the plaintiff in a judgment, which is necessary to the plaintiff's chain of title, which is disputed on appeal, the case is remanded in order that the fact may be determined.

APPEAL by defendant from *Cline, J.,* at March Term, 1915, of SWAIN.

Frye & Frye for plaintiff.

Bryson & Black and A. J. Franklin for defendant.

PER CURIAM. This is an action to recover land, and three of the links in the plaintiff's chain of title are, first, a judgment rendered in the Superior Court of Swain County at July Term, 1902, in the action of *Lee Fuller v. Henry T. Jenkins;* second, a deed from Lee Fuller and wife, Josephine Fuller, to H. T. Jenkins, dated 28 January, 1896, registered in Book 17, page 364; and, third, a deed from Lee Fuller and wife, S. J. Fuller, to Margaret Evans, dated 15 January, 1903, and registered in Book 41, page 72; and as the plaintiff claims that S. H. Fuller, named in said judgment, is the same person as Josephine Fuller, one of the grantors in the first deed, and is the same person as S. J.

Fuller, one of the grantors in the second deed, and this is denied by the defendant, and as the determination of this fact may be important and material in deciding the controversy between the plaintiff and the defendant, it is ordered that the action be remanded to the Superior Court of Swain County in order that this fact may be determined.

The Superior Court will certify its findings thereon to this Court.

Remanded.

(682)

STATE v. M. C. MEDLIN.

(Filed 20 October, 1915.)

1. Municipal Corporations—Ordinances—Sunday Closing—Unlawful Discrimination—Test—Procedure—Constitutional Law.

Commissioners of a town may, by valid ordinance, prohibit the opening of places of business in the town on Sunday, excepting drug stores, Revisal, sec. 2923; and where by further provision of the ordinance the drug stores may sell drinks, tobacco, etc., between certain hours, an objection to this provision on the constitutional ground of unlawful discrimination can only be tested by indicting the drug stores selling the soft drinks between the hours prescribed, and not by alleging it as a defense to an indictment that other stores have violated this ordinance.

2. Municipal Corporations—Statutes—Ordinances—Sunday Closing—Unreasonable Regulation—Drug Stores—Other Commodities—Constitutional Law.

An ordinance of a town may, under the provisions of the Revisal, sec. 2923, prohibit the opening of all places of business on Sunday, except drug stores; and it is not an unreasonable regulation, under the police power of the town, inasmuch as drug stores are open all day Sunday; for the governing authorities to further provide that they may sell articles of common use which are *quasi* necessities to many, such as mineral waters, soft drinks, cigars and tobacco only, between certain hours of that day.

3. Municipal Corporations—Ordinances—Sunday Closing—Interpretation of Statutes.

Revisal, sec. 2836, forbidding "work in ordinary callings on Sunday," under a penalty of $1, does not make keeping open shop and selling goods on Sunday an indictable offense, and an ordinance of a town, passed in pursuance of Revisal, sec. 2923, for the better government of the town, prohibiting keeping open stores and other places of business on Sunday for the purpose of buying and selling, excepting ice, drugs and medicines, and permitting drug stores to sell soft drinks, etc., within certain hours, is not objectionable on the ground that the offense is covered by Revisal, sec. 2836, for the ordinance is passed under the police powers of the town, its violation is indictable, and in furtherance of local government, which the statute contemplates.

4. Municipal Corporations—Ordinances — Valid in Part — Constitutional Law.

A town ordinance which is valid in part as a police regulation, regarding Sunday hours, will not be held invalid because of a further and unconstitutional provision or exception from its general terms.

APPEAL by the State from *Peebles, J.*, at September Term, 1915, of WAKE

The defendant was found guilty in the recorder's court of Zebulon of violation of an ordinance of that town, and appealed to the Superior Court. In the Superior Court, on a special verdict, the court held that the ordinance was void, and from this judgment the State appealed. The town charter of Zebulon is chapter 84, Private Laws 1907.

The ordinance in question provides as follows:

"SECTION 2. Any person who shall open any shop or store on Sunday for the purpose of buying or selling (except ice) shall be fined $5;
(683) and if any store shall be found open it shall be *prima facie* evidence that the same was opened by the proprietor for the purpose of selling; but drug stores may be kept open at all times on Sunday for the sale of drugs and medicines; and from 6 to 9:30 o'clock in the morning and from 1 to 4:30 o'clock in the afternoon for the sale of drugs, medicines, mineral waters, soft drinks, cigars and tobacco only."

The ordinance was adopted by virtue of Revisal, 2923, which provides: "The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, as they may deem necessary."

Attorney-General Bickett and Walter Clark, Jr., for the State.

J. C. Little and A. J. Barwick for defendant.

CLARK, C. J. The special verdict finds that on Sunday, 18 July, 1915, after the adoption of the above ordinance, the defendant, who did not operate a drug store, between the hours of 6 and 8 o'clock a. m. opened his grocery store in the town of Zebulon and sold cigars, cigarettes, and coca-cola to several purchasers and received cash payment, and that at the same time a drug store in said town was open for the sale of articles other than drugs, etc.

The defendant contends that the ordinance is invalid:

1. Because the ordinance creates an invalid discrimination in favor of drug stores and against general dealers in the matter of the sales of cigars, tobacco, and soft drinks on Sundays.

The exception is to the last paragraph of the ordinance, which permits, "from 6 to 9:30 in the morning and from 1 to 4:30 o'clock in the

afternoon," drug stores to be kept open "for the sale of drugs, medicines, mineral waters, soft drinks, cigars and tobacco only." If this is an invalid discrimination in favor of drug stores, the point would arise only upon an indictment against the drug store for acting under said section. If that paragraph is invalid the keeper of the drug store would be guilty; but the defendant cannot raise the point, because the commissioners had the right to close all establishments on Sunday. But conceding that the point could arise in this case, we do not find that such ordinance was beyond the police power vested in the town commissioners.

It cannot be contended that the commissioners could not permit the drug stores to be kept open at all times on Sunday for the sale of drugs and medicines as a matter of public necessity. The gorverning authorities of the town might think that the peace and order of the town and a proper regard for public opinion and securing one day of rest in seven might require that no establishment should be open for the sale of goods other than drugs and medicines on that day at all. It is not beyond a reasonable regulation under the police power for (684) them to provide further, that inasmuch as drug stores are open all day Sundays, as a matter of necessity, they might be permitted to sell articles of common use which are *quasi* necessities to many, such as mineral waters, soft drinks, cigars and tobacco only, from 6 to 9:30 in the morning from 1 to 4:30 in the afternoon. This permits the smallest encroachment upon one rest day in seven, which rest the public requires.

The town authorities were not acting unreasonably in not permitting all other establishments to be opened even for that short time, because people might there congregate to the public scandal and to the dissatisfaction of the public, who expect a decent, reasonable observance of the Sabbath. Such results would not follow permitting the drug stores to sell these articles for a limited time on Sunday, since they are open all that day for the sale of medicine as a matter of necessity.

2. The second ground of objection is that there is a general statute prohibiting work and labor on Sunday, Revisal, 2836, and therefore the town has not the authority to adopt an ordinance covering the same subject. But Revisal, 2836, "forbidding work in ordinary callings on Sunday" under penalty of $1, does not make keeping open shop and selling goods on Sunday an indictable offense." *S. v. Brooksbank,* 28 N. C., 73; *S. v. Ricketts,* 74 N. C. 187. To same effect, *Melvin v. Easley,* 52 N. C., 356, which holds: "The statute in its operation is confined to manual, visible, or noisy labor, such as is calculated to disturb other people; for example, keeping open store or working in a blacksmith's shop. The Legislature has power to prohibit labor of this kind on Sunday." The whole subject is reviewed and discussed in *Rodman v. Robinson,* 134 N. C., 503.

This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug stores to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power. Neither does it cover the same ground as Revisal, 2836.

Such local regulations are within the powers conferred on town authorities in their exercise of the police power, and if not satisfactory to the community such regulations will doubtless be changed at the instance of their constituents or by the election of a new board of commissioners. Public sentiment in this regard varies in different localities, and the power of making these local regulations is simply an exercise of "home rule," which is wisely vested in the town commissioners to conform to the sense of public decency and peace and order, which is observed by compliance with the sentiments of their constituents. Such regulations are neither already provided by the general law nor are they forbidden by any statute.

(685) Revisal, 2923, takes notice that there may be a diversity of views in different towns, and provides that the commissioners "shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, *as they may deem necessary.*" When they come in conflict with the general statutes, the ordinances must give way. *Washington v. Hammond,* 76 N. C., 33; *S. v. Langston,* 88 N. C., 692. This ordinance does not conflict with any general statute; nor does it duplicate any general statute.

Even if the last paragraph of the ordinance, providing that drug stores may sell soft drinks and tobacco during certain hours on Sunday, were invalid, only that provision would be invalid, and the other provisions would be valid. *S. v. Earnhardt,* 107 N. C., 789.

Upon the special verdict judgment should have been imposed, and the cause is remanded to the Superior Court to that end.

Reversed.

Cited: S. v. Davis, 171 N. C. 811 (g); *S. v. Burbage,* 172 N. C. 878 (g); *Lawrence v. Nissen,* 173 N. C. 364 (g); *S. v. Kirkpatrick,* 179 N. C. 751 (g); *S. v. Pulliam,* 184 N. C. 687 (g); *S. v. Weddington,* 188 N. C. 645 (g); *Bizzell v. Goldsboro,* 192 N. C. 357 (g).

STATE v. J. H. JOHNSON.

(Filed 3 November, 1915.)

1. Intoxicating Liquors—Indictment—General and Local Statutes—Interpretation of Statutes—Criminal Law.

A charge against the defendant under indictment in a recorder's court that he did unlawfully, etc., on a certain day, violate the law by selling less than two gallons of intoxicating wine to a certain specified person, for a stated price paid, contrary to the form of the statute and against the peace and dignity of the State, is based upon all the relevant statutes on the subject of prohibition; and where a local law exists making the sale of such intoxicants on the premises, in packages, etc., unlawful if less than two gallons each, and no mention is made of the local statute in the charge, a conviction may be had under the general statutes relating to prohibition, making unlawful a sale of this character of less than two and a half gallons to the package. Sec. 7, ch. 71, Laws 1908; sec. 8, ch. 44, Laws 1913.

2. Interpretation of Statutes—General and Local Statutes—Repealing Statutes.

A general legislative enactment will not ordinarily be construed by the court to repeal by implication an existing particular statute, or one local in its application; but where it is plainly manifest from the terms of the general law that such was the intention of the Legislature, the intent so found will prevail and effect a repeal of the special statute, when in conflict therewith.

3. Same—Intoxicating Liquors—Criminal Law.

Our prohibition laws, sec. 7, ch. 71, Laws 1908, and sec. 8, ch. 44, Laws 1913, contain the same repealing clauses, that nothing therein contained "shall operate to repeal any of the local or special acts of the General Assembly prohibiting the sale or manufacture of any of the liquors mentioned in this act; but all such acts shall continue in full force and effect and in concurrence herewith; and indictments or prosecutions may be had under this act or any special or local act relating to the same subject." *Held*, it was the intention of the Legislature in carrying out the public policy of the State, to adopt a uniform rule in regard to the sale of liquor, and that the special or local laws passed in respect thereto must conform to the general provisions of the act, and where, by a former special or local act, the sale of wines of not less than two gallons to a package, under certain conditions, was made unlawful, this provision was in conflict with the terms of the general statute prohibiting a sale of less than two and a half gallons to the package. *S. v. Swink*, 151 N. C., 726, cited, discussed, and applied.

4. Same—Indictment.

Where a general law fixes the minimum quantity of wines to be sold in the State, under certain conditions, at two and a half gollons and a prior statute of local application has fixed the quantity at two gallons, and the former of the statutes provides that the local laws shall continue

in force and effect in "concurrence" therewith: *Held*, the local act should be brought into consistency with the general law and read in harmony therewith, so that an indictment will lie for the sale of the wines in less quantity than two and one-half gallons to a package.

5. Interpretation of Statutes—Ambiguity—Intent—Results.

Where the language of a statute is ambiguous, admitting of two constructions, that interpretation will be given it which will best tend to make the statute effectual and to produce the beneficial results intended by its general terms, in preference to the one which will defeat its purpose or be productive of actual mischief.

6. Interpretation of Statutes—Particular and Local Statutes—Definition.

A local law is one which pertains to a particular place or to a definite region or portion of space, or is restricted to one place; and a special law is one that is different from others of the same kind or designated for a particular purpose, or is limited in range or confined to a prescribed field of action or operation.

7. Trials—Verdicts—Immaterial—Answers—Criminal Law.

Where the jury have found by their verdict that the defendant was guilty under the charge of the court of violating the prohibition law by the sale of wines in packages of less than two and one-half gallons, with further statement that they did so only in deference to the charge of the court, and the charge given was clear and correct, the guilt of the prisoner is not affected by the further finding of the jury.

(686) APPEAL by defendant from *Allen, J.*, at May Term, 1915, of CUMBERLAND.

Criminal action. Defendant was charged in the recorder's court with unlawfully selling wine, upon the following affidavit:

A. B. Breece, being duly sworn, complains and says, upon information and belief, that at and in said county, and in Rockfish Township, on or about 12 Deceember, 1914, J. H. Johnson did unlawfully, willfully and feloniously violate the law by selling less than two gallons of intoxicating wine, to wit, one gallon to Charlie Perry, and said Charlie
(687) Perry paid said J. H. Johnson $1.25 for same, contrary to the form of the statute and against the peace and dignity of the State.

A. B. BREECE.

Subscribed and sworn to before me, this 8 January, 1915.

C. C. HOWARD,
Clerk of the Recorder's Court.

Johnson was arrested under a warrant issued upon the affidavit and tried in the recorder's court, where he was convicted, and appealed to the Superior Court.

Chapter 125, Laws 1903, as amended by chapter 800, Laws 1905, and chapter 743, Laws 1907, is "An act to prohibit the manufacture and sale and the shipping into Cumberland County of spirituous, vinous, or malt liquors." Originally it prohibited the sale of less than five gallons of wine, but this was reduced by the act of 1905 to two gallons. Section 1 of the act reads as follows:

"That it shall be unlawful for any person, firm, or corporation to rectify, manufacture, sell, or otherwise dispose of, for gain, any spirituous, vinous, or malt liquors or intoxicating bitters within the county of Cumberland: *Provided,* that wines and ciders may be manufactured and sold on the premises where the fruit, grapes, or berries are grown, in packages containing not less that two gallons per package; but no wine or cider shall be drunk upon the premises where sold, nor shall the package containing the same be opened on said premises, nor shall it be lawful to sell any wine or cider to an unmarried infant."

The act prohibiting the manufacture and sale of intoxicating liquors in this State has a proviso which reads as follows: *"Provided further,* that wines and ciders may be manufactured or made from grapes, berries, or fruits, and wine sold at the place of manufacture only, and only in sealed or crated packages containing not less that two and a half gallons per package; but no wine, when sold, shall be drunk upon the premises where sold, nor shall the package containing the same be opened on said premises."

The repealing clause in the said act forbidding the manufacture and sale of intoxicating liquors in the State (sec. 7, ch. 71, Laws of Extra Session 1908), and the search and seizure act (sec. 8, ch. 44, Laws 1913), are the same, namely: "That all laws or parts of laws in conflict with this act be and the same are hereby, to the extent of such conflict, repealed: *Provided, however,* that nothing in this act shall operate to repeal any of the local or special acts of the General Assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this act; but all such acts shall continue in full force and effect and in concurrence herewith; and indictment or prosecution may be had either under this act or any special or (688) local act relating to the same subject."

The latter act contains the following additional proviso: *"Provided further,* that this act shall not in any way repeal or modify chapter 71 of the Public Laws of North Carolina of the Extra Session of 1908."

The court charged the jury that the prohibition act of Cumberland County was repealed by the general law forbidding the sale of liquor in the State, and if the jury found that defendant had sold two gallons of wine, whether in one package or in two packages of one gallon each, they would return a verdict of guilty. Defendant admitted selling two

gallons, but in one package. The jury convicted him, and he appealed to this Court.

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

Sinclair, Dye & Ray for defendant.

WALKER, J., after stating the case: The defendant contends that the Cumberland act, as we will call it, was not repealed by the general prohibition law, because of the proviso which excepts it, with other similar and local statutes, from its operation; and, this being so, he could not be convicted under the charge as it was drawn under the Cumberland act, and not under the general State law. We do not so understand the affidavit. It charges him with unlawfully selling less than two gallons of intoxicating wine, that is, one gallon, to Charles Perry, for which he received $1.25, "contrary to the form of the statute and against the peace and dignity of the State." This concludes against any and every statute, especially those of a public and general nature, and the Cumberland statute is not mentioned. But if this were not so, it would be material only if the latter act had not been repealed by the general law, and he had sold not less than two gallons. We are of the opinion that there was such a repeal of the Cumberland act.

A general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body. A general later affirmative law does not abrogate an earlier special one by mere implication. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter the special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as (689) silently excluding from its operation the cases which have been provided for by the special one. The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction. Endlich Int. Stat., 223 *et seq.*, *Montford v. Allen,* 111 Ga., 18.

But here there is a special reference to "local and special" statutes, relating to the sale of liquor, and for the reason that the Legislature intended to exclude the inference that by repealing all conflicting statutes

it was intended also to abrogate those which were in harmony with the purpose of the general law, and, therefore, could be enforced concurrently with it. There were many such laws, covering nearly the entire area of the State, such as local laws prohibiting the sale of liquor within certain distances of schoolhouses, churches, and other designated places, and also laws prohibiting the sale of liquors, excepting wine in quantities larger than two and one-half gallons, in certain counties or other localities of the State.

It will be seen that the proviso saves from the operation of the act only those local or special laws which *prohibited* the manufacture or sale, or other disposition, of any of the liquors mentioned in the body of the act, and not which *permitted* the sale in any quantity, by excepting wines in prescribed quantities; but it was thought wise and expedient, as a new policy of the State, to have a minimum quantity below which no wine should be sold, applicable to all parts of the State, except in those localities where a larger minimum was provided for, it being considered that as those local acts still further restricted the sale of liquor, it was consistent with the general plan of prohibition for them to remain in force and effect; and this same reason would, of course, apply where there was an absolute prohibition without any saving clause. This view is greatly strengthened, we think, by the words, "in concurrence herewith." The word "concurrent," in one or more of its senses, implies pursuit of the same course, or seeking the same objects; agreeing in the same act or opinion; contributing to the same event or effect, and Webster indorses these definitions.

Where wine was allowed to be sold in quantities less than two and one-half gallons it was certainly in disagreement with this new and general policy of the State as written into the prohibition act. In making the proviso to the repealing clause, the object was to advance the prohibition cause, and not to retard or obstruct its full and free action, or to impair its efficacy.

Counsel for defendant have argued in their brief that the Cumberland act was passed at an election in that county in 1902, when a large majority of votes was cast in its favor, and it, therefore, represents and expresses the popular sentiment of that locality, and that its provisions are more drastic than those of any general law, as it makes (690) the sale of liquor, contrary to its provisions, a felony, and prescribes severe punishment. As to the vote, it may be said, if this is a relevent matter at all, that since 1902, that is, in 1908, the voters of the State by a large majority (44,000) approved the prohibition law, now chapter 71 of the Laws of 1908, and Cumberland County contributed to that majority 772 votes, the vote in that county being 1,524 in favor of the act and 952 against it. But we do not base our decision upon any

such ground, even if we are permitted to do so, but upon the broader and stronger reason that our construction of the two acts is consistent with the general policy of the State as declared in the prohibition law, and that it was evidently intended that all the acts upon this subject should be brought into one consistent and harmonious body of laws, so that they could be enforced together and without any conflict with the leading intent that there should be no sale under two and a half gallons.

This view of the statute is supported by the fact that the proviso excepts from the repealing clause only those "local and special" acts which prohibit the sale of liquor, and not those which permit it. The repealing clause referred to all acts in conflict with the provisions then being enacted into law. There were many acts of this kind, and the intention was to preserve those which absolutely prohibited the traffic, as being in accord with the general purpose of the new act, and to destroy those which, while they effected a partial prohibition, were at variance with it by reason of their exemption as to wine sold in less quantity than two and one-half gallons. The statutes which increased the minimum quantity of wine allowed to be sold on the premises by the manufacturer were really considered as virtually in harmony with the principle of the act, as under them those who sold less than two and a half gallons could be indicted. This reasoning leads to a conclusion, which is also strengthened by the further provision in the act, that where there is a sale of less than two and a half gallons, when there would be a violation both of the general law and of the acts just mentioned, the offender may be indicted under either law, whereas, if the Cumberland act is held to be in force, this provision of the act could not as well be enforced.

We admit the principle that general and special laws should stand together, if possible, the one as the general law of the land and the other as the law of the particular case, *Hayes v. M. L., etc., R. Co.*, 117 La., 593; and that where there are two opposing acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act, *Woodworth v. Kalamazoo*, 135 Mich., 233; *S. v.* (691) *Sturgess*, 9 Oregon, 537; but that is so where there is nothing else more controlling, as there is in this case. "The law requires that in the interpretation of a statute we should give it that meaning which is clearly expressed, and if there is doubt or ambiguity we should construe it so as to ascertain from its language what was the true intention of the Legislature." *McLeod v. Comrs.*, 148 N. C., 85; *Fortune v. Comrs.*, 140 N. C., 322; *Abernathy v. Comrs.*, 169 N. C., 631.

The first canon in the construction of statutes is to ascertain the legislative intent, as gathered from the statute itself, which should be enforced accordingly as the only authentic expression of the popular will. We may consider other statutes relating to the same subject, and the purpose to be accomplished, where there is any real doubt as to the true meaning; but whenever and however discovered, the intent prevails over all other considerations.

The predominant idea here was to fix a general minimum of quantity, a standard for all, except where special acts provided for prohibition of the sale of wines altogether, or permitted a sale of a quantity equal to or more than that fixed by the general law, in which case the two classes of statutes could be enforced harmoniously, or concurrently, in furtherance of the common design. If this were not so, there would constantly be sales in many parts of the State contrary to the prohibition of the general act, which could not be punished under it. We should so construe this statute, if not in violation of the accepted rules, so as to subserve the clearly expressed purpose that there should be an end to sales in the State except under the restrictions imposed by it. It might greatly disappoint, if not defeat, its beneficent object should we do otherwise.

If a statute plainly expresses the legislative purpose and meaning on its face, it must be enforced exactly as it stands, and without any regard whatever to the results which will flow from it, and there is then said to be no reason for a construction of it; but if the language is ambiguous, or if it is fairly open to either of two constructions, the court may and should consider the effects and consequences which will follow from construing it in one way or in the other, and adopt that rendering of its meaning which will best tend to make the statute effectual and produce the most beneficial results; and this is the well recognized rule deducible from the authorities and stated by a standard text-writer almost literally, and certainly with substantial sameness, in the last edition of his work. Black on Interpretation of Laws (2 Ed.), p. 100. It is competent, therefore, in seeking for the real meaning, to consider the comparative operation of the statute under the one construction or under the other, and if one will defeat its purpose, or would result in actual mischief, or impair the principle which had come to be regarded as the settled policy of the State, or lead to consequences which would be so unreasonable as to be legally absurd, by contravening the gen- (692) eral and evident object to be attained by its adoption, while no such baneful result would be produced by the other construction, the Legislature must be supposed to have intended that the reasonable, effective, and beneficial interpretation of the statute should be applied to it, and the court will decide accordingly. Black, p. 101; *Collins v.*

New Hampshire, 171 U. S., 30. Many cases in support of this position are collected in the note on page 101 of Black's Int. of Laws.

If we apply this rule and test of the law to the statute in question, we find no difficulty in adhering to the view previously expressed, that the sale in a less quantity than two and one-half gallons is forbidden, even though it was formerly allowed under some local statute. But we think the question has been virtually decided in *S. v. Swink,* 151 N. C., 726, where it was held that the Asheville local act prohibiting the sale of liquor in that city was repealed by the general statute of 1908.

It is argued by the defendant's counsel that the *Swink case* does not apply, because the Asheville statute is not local or special, within the intent of the proviso, while the Cumberland act is, because the latter is such a "local or special" statute as was contemplated; but this Court held in the case just cited that the law in regard to a sale in Asheville was such a local or special act, as it held it to have been repealed, and could not have so decided unless it was, and, therefore, was within the words of the proviso. A law is local when it pertains to a particular place or to a definite region or portion of space, or is restricted to one place, as, for instance, a local custom; and it is special when it is different from others of the same general kind or designed for a particular purpose, or is limited in range or confined to a prescribed field of action or operation; and so say the lexicographers. Webster definies a "local law" or "special statute" to be "an act of the Legislature which has reference to a particular person, place, or interest." This brings both the Asheville and the Cumberland statutes within the language of the proviso, and a decision upon the one must apply to the other.

The prohibition law was first drafted and adopted by the Legislature and then submitted to the people, who ratified it by a very large majority. It has generally been supposed to prohibit the sale of wine in any quantity less than two and one-half gallons. It appears that the people intended it to be so construed, and the object of all construction is to gather the intent from the statute and then to strictly enforce the popular will as thus expressed. One of the prime objects of government is to secure the health, happiness, and general welfare of the people; and so does our Constitution declare. Laws made to effectuate this purpose and to safeguard the home and the fireside against what was regarded as the intolerable evils of the liquor traffic, which had wrecked so many useful lives and wasted so much of the substance of the State, are
(693) entitled to a construction which will prevent a recurrence of these misfortunes, especially when it is, as here, consistent with its language and the evident intent.

The jury returned a verdict of guilty, "but stated that they would not have found the defendant guilty except in deference to his Honor's

charge." It may be that they believed the Cumberland act was still in force, though the judge had said it was not, and they merely submitted to this ruling, and were right in doing so. The charge was an instructive one, not only stating the law correctly, but with clearness and accuracy, and giving sound reasons for it. If the defendant acted under a misapprehension as to the law, and honestly believed it was in force, and did not attempt to evade it, if it had been in force, by an indirect sale of a less quantity of wine than it authorized to be sold, he is most unfortunate, provided he was endeavoring, in good faith, to keep his promise to the court, when on his conviction at former terms of the court he agreed to be of good behavior, keep the peace, and not sell any more wine contrary to the law. The officers had pursued him for four years, garnered a "bunch of violations," several convictions following, defendant securing only one *nol. pros.* and one acquittal. If he had really reformed, and while he technically violated the law, he yet was trying to behave himself and lead a better life, we cannot help him, as we have no power to do so, but there is another department ordained by the Constitution to which he can appeal for clemency, where he will receive a just and merciful hearing.

There is no error in the record.

No error.

Cited: Bank v. Loven, 172 N. C. 670 (5b); *Board of Agriculture v. Drainage District,* 177 N. C. 226 (5g); *S. v. Burnett,* 184 N. C. 786 (3f); *Felmet v. Comrs.,* 186 N. C. 252 (2g); *Blair v. Comrs.,* 187 N. C. 490 (2g, 5g); *Hunt v. Eure,* 188 N. C. 719 (5g); *Asheville v. Herbert,* 190 N. C. 736 (2g); *Ins. Co. v. Wade,* 195 N. C. 425 (2g); *Hagood v. Doughton,* 195 N. C. 819 (5g); *R. R. v. Gaston County,* 200 N. C. 783 (2f); *Hammond v. Charlotte,* 205 N. C. 472 (2g); *Burt v. Biscoe,* 209 N. C. 74 (5g); *Rogers v. Davis,* 212 N. C. 36 (2g); *S. v. Dixon,* 215 N. C. 165 (6g); *Charlotte v. Kavanaugh,* 221 N. C. 263 (2g); *Valentine v. Gill, Comr. of Revenue,* 223 N. C. 399 (5g); *Power Co. v. Bowles,* 229 N. C. 150 (2g).

STATE v. NATHAN TAYLOR.

(Filed 3 November, 1915.)

1. Roads and Highways—Working Roads—Payment of Money—Statutes—Constitutional Law.

A statute imposing a duty upon citizens of a township or road district between the ages of 21 and 45 years to work the public roads therein is

constitutional and valid, and the act may make it optional that the citizens either work the roads when notified under the terms of the statute or pay a sum certain in lieu thereof to be applied to the working of the roads.

2. Same—Taxation—Constitutional Equation.

A statutory requirement that citizens of a township or road district shall work the roads therein for four days or pay a sum of $4, to be used for that purpose, is not a capitation tax or subject to the constitutional equation.

3. Roads and Highways—Working Roads—Public Policy—Statutes.

The working of public roads in the State or requiring payment of money in lieu thereof is a part of the public policy of the State within legislative control.

(694) APPEAL by defendant from *Cline, J.*, at August Term, 1915, of CASWELL.

Attorney-General Bickett, Assistant Attorney-General Calvert, and Carlton & Upchurch for the State.

P. W. Glidewell for defendant.

CLARK, C. J. This proceeding began by warrant before a justice of the peace, and on appeal to the Superior Court by the defendant it was found, on a special verdict, that the defendant, after having been warned by the road supervisor to work the public roads of his township, failed to do so, and also failed to pay the sum of $4 in lieu of such work, as required by section 4, chapter 16, Public-Local Laws 1915. This provision is as follows: "Any person liable to such duty may pay to the supervisor of his township or road district the sum of $4 in lieu of such labor, to be applied by such supervisor to the improvement of the roads in that district."

The defendant was 35 years of age and subject to road duty. Upon the special verdict the court was of opinion that the defendant was guilty, and the jury so found.

The contention of the defendant is that the requirement that any person liable to road duty in Caswell County who shall fail to work the roads shall pay $4, to be applied to the roads, in lieu of his labor for four days, is a capitation tax, and unconstitutional.

In *S. v. Wheeler*, 141 N. C., 773, it was held: "The requirement to work the public roads is not a poll or capitation tax; so that an act that requires such work only from those between the ages of 21 and 45 is not unconstitutional." This provision for the payment of $4 in lieu of the required four days labor is merely a method of commuting this duty by

the payment of $4, evidently upon the presumption that with the $4 the road supervisor can hire an equal amount of labor to be done on the roads. The defendant had the option to do the work himself. The same proposition has been considered and held in a line of decisions, *S. v. Sharp,* 125 N. C., 628; *S. v. Covington, ib.,* 641; *S. v. Holleman,* 139 N. C., 648, which after full consideration of the subject held that the conscription of labor is not a tax at all, but the exaction of a public duty like "military service, service upon a jury, a grand jury or special venire, as a witness, which duties formerly were, and to some extent are still, required to be rendered to this State without compensation." We were asked to reconsider those decisions in *S. v. Wheeler,* 141 N. C., 773, and after giving the matter full deliberation we reaffirmed them.

In *S. v. Wheeler, supra,* we said, after full deliberation and re- (695) consideration of the above cases: "For near 250 years the roads of this State were worked solely by the conscription of labor. It may have been inequitable, but it was never thought by any one to be unconstitutional, nor has the idea been advanced heretofore that to work the roads by labor was to work them by taxation. The validity of working the roads by labor was sustained in *S. v. Halifax,* 15 N. C., 345, and has been recognized in countless trials for failure to work the roads." In *S. v. Wheeler* the statute under construction applied to Wake County, and was almost identical with this.

The subject has been so fully discussed in the cases above cited that we can add nothing. The system of working roads by conscription of labor was handed down to us from the English law, *S. v. Covington,* 125 N. C., at p. 641, and was the system among the Romans till in their later days when by large appropriations they built the magnificent highways whose remains still abide. Working roads by conscription of labor was the system in France, where it was known as *Corvées,* and was one of the great grievances which were swept away by their Revolution.

The objection that working roads by conscription of labor is essentially unjust, because it places an undue burden upon those who use the roads least, has been often presented to us, and we can only repeat what was said in *S. v. Holleman,* 139 N. C., 648, which was quoted with approval in *S. v. Wheeler,* 141 N. C., 779: "It is for the legislative department to prescribe by what methods the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of those methods; and this may vary in different counties and localities to meet the wishes of the people of each, and can be changed by subsequent legislatures."

Originally, in all countries, doubtless, roads were worked by conscription of labor. The tendency has been, with advancing civilization, to

change to a system of working the roads by taxation of property. This has become the rule in some countries and in some States of this Union, and is being gradually adopted in this State, as much by reason of the fact that working the roads by conscripted labor has proven inefficient as by consideration of the injustice of the discrimination involved in that system. But how far and when the change shall be made, and to what localities it shall apply, is for the lawmaking body, which prescribes the public policy for the State, and not for the courts.

Whenever the policy of working the roads by taxation is adopted, of course the constitutional equation applies, as was held in *S. v. Godwin*, 123 N. C., 697, quoted by the defendant. But that case has no application to this.

Affirmed.

Cited: S. v. Kelly, 186 N. C. 371 (1f, 3g); *Express Co. v. Charlotte*, 186 N. C. 674 (3g); *Dixon v. Comrs. of Pitt*, 200 N. C. 220 (2d).

(696)

STATE v. R. C. TOWNSEND.

(Filed 3 November, 1915.)

Landlord and Tenant—Criminal Law—Ungathered Crops—Indictment—Interpretation of Statutes.

The Landlord and Tenant Act, Revisal, sec. 1993, vests the constructive possession of the crop in the landlord to protect his liens, and the actual possession in the tenant to subserve the interests of both in the cultivation and gathering of the crops, and under the construction of Revisal, sec. 3665, making it an indictable offense for the tenant to remove the crops under certain conditions, with sec. 3664, making it indictable for the landlord to unlawfully, etc., seize the crops when nothing is due him, it is *Held*, that the word "crops" includes those ungathered as well as gathered, and an indictment for that the landlord seized the "corn growing and unmatured in the field," etc., charges an indictable offense, when it is otherwise sufficient.

APPEAL by the State from *Whedbee, J.*, at July Term, 1915, of ROBESON.

The defendant, a landlord, is charged with unlawfully seizing the crop of his tenant, the material parts of the warrant alleging that he "did unlawfully, willfully, knowingly, and without process of law, and unjustly, seize the growing crops and the premises thereof, of him, the said Charlie Lowrie, his tenant, when there was nothing due him, the said R. C. Townsend, by him, the said tenant, Charlie Lowrie, said crops

being corn and cotton growing and unmatured in the field at the time of such seizure, contrary to law, and against the peace and dignity of the State."

The defendant demurred to the warrant, contending that it charged no indictable offense. The demurrer was sustained, and the State appealed.

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

No counsel for defendant.

ALLEN, J. The Landlord and Tenant Act (Rev., sec. 1993) vests the constructive possession of the crops in the landloard until his rents and liens are paid, but the actual possession is in the tenant. *Jordan v. Bryan,* 103 N. C., 59. The constructive possession is to insure the performance of the rental contract by the tenant and to enable the landlord to collect his rents and advancements, and the actual possession is given to the tenant for the benefit of both, as otherwise the crops could not be cultivated and gathered. The General Assembly having established this relation, and having fixed the rights of the parties, has undertaken to compel each to deal justly by the other.

The tenant who removes any part of the crop from the land without the consent of the landlord and without giving him five days notice, and before satisfying all liens, is indictable (Rev., sec. (697) 3665), as is the landlord who unlawfully and knowingly and without process of law unjustly seizes the crops when there is nothing due him (Rev., sec. 3664). In all these statutes the word "crop" is used, not "gathered" or "ungathered crop," and the same meaning must be given to it throughout. If the word does not embrace ungathered crops when imposing the prohibition upon the landlord, it can mean no more when the tenant is forbidden to remove the crop, and a statute intended to give ample protection to both has but little effect. It is comprehensive enough to include both gathered and ungathered crops, and when the purpose of the General Assembly is considered we must conclude it was so intended.

In *Dana v. Lewis,* 2 R. I., 492, it was held that "a bequest of crops included growing crops, as the word crops may mean either gathered or growing crops"; and in *Ins. Co. v. Dehaven,* 5 Atl., 65, that the language in a policy of insurance on "stock crops and farming implements" was "broad enough to cover growing crops."

We are, therefore, of opinion his Honor was in error in sustaining the demurrer to the warrant, which follows the words of the statute.

Reversed.

STATE v. S. A. GIBSON.

(Filed 3 November, 1915.)

1. **Criminal Law—Pleas—Former Jeopardy.**

Upon plea of former jeopardy in a criminal action, the question presented by such plea must ordinarily be determined by the evidence.

2. **Same—Same or Separate Offenses.**

Upon such a plea it is not sufficient that the two prosecutions should have grown out of the same transaction, for the plea will not be sustained unless there is an exact and complete identity in the two offenses charged in the bills, as they must be for the same crime, both in law and in fact.

3. **Same—False Pretense.**

Where a bill of indictment charges that the defendant obtained money by a false pretense from a certain person therein named, and the proof was that he had not received any money from him, but had obtained his signature on a note by false pretense, upon which he had obtained money from another, and the action is dismissed for variance between the charge and the proof, the defendant may not successfully plead former jeopardy upon trial under another and separate indictment charging the false pretense in the procurement of the note from another person.

4. **Same—Indictment.**

An indictment for a criminal offense should state the offense charged with reasonable certainty, or set forth the special manner of the whole fact so that it can be clearly seen what particular crime is intended to be alleged, and while in this indictment for obtaining a note by false pretense the bill should have charged expressly and directly that the defendant obtained the note by reason of the false pretense, it sufficiently informed the defendant of the particular charge against him, and is held not to be fatally defective.

5. **Criminal Law—Pleas—Former Jeopardy — Issues of Fact — Trials — Questions for Jury.**

It is unnecessary for the trial judge, upon defendant's plea of former jeopardy in a criminal action, to submit to the jury an issue as to the identity of the evidence in the two actions, it appearing that the offenses charged were not the same either in fact or law.

(698) APPEAL by defendant from *Cline, J.*, at August Term, 1915, of ROCKINGHAM.

Criminal action. The defendant was indicted for obtaining a note by false pretense. When the case was here before (169 N. C., 326) the indictment was for obtaining money by the false pretense, while the evidence showed that it was not money but the note that had thus been procured, and holding that there was a material variance, as will appear from a reading of the case, we directed a nonsuit. At May Term, 1915,

the solicitor sent another bill, upon which the defendant was convicted, and from the judgment he has appealed to this Court. The other matters will appear in the opinion of the Court.

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

J. M. Sharp, W. Reade Johnson for defendant.

WALKER, J., after stating the case: The defendant has set up as a defense in this case that by the former trial he was once put in jeopardy, and, therefore, that he cannot be tried again, and is entitled to his discharge. He filed a plea in abatement, which, if the proper method by which to avail himself of former acquittal or former jeopardy, was properly overruled, as also was his motion in arrest of judgment. Whether there has been former jeopardy must be determined by the evidence, except, perhaps, in certain excepted cases, and this is not one of them. But defendant has presented the question by prayers for instructions which the court refused to give. An examination of the former appeal with the record in this case satisfies us that there was no former jeopardy, and no former acquittal, because we are of the opinion that the offenses charged in the two bills of indictment are not the same. It was held in *S. v. Nash* that in order to support a plea of former acquittal, or former jeopardy, it is not sufficient that the two prosecutions should have grown out of the same transaction, but the plea will not be sustained unless there is an exact and complete identity in the two offenses charged in the bills, as they must be for the same crime, both in law and in fact.

Justice Ruffin said, in *Nash's case,* that the true test is, Could (699) the defendant have been convicted under the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second? citing *Rex v. Vandercomb,* 1 Bennett & Heard's Leading Cr. Cases, p. 522. In other words, that there must be identity of the two offenses. If, upon the facts, they are legally the same, there has been former jeopardy, and the verdict in the former prosecution will protect the defendant against a second one. Clark's Cr. Procedure (1 Ed.), p. 396, declares it to be "the general rule that if the crimes are so distinct, either in fact or in law, that evidence of the facts charged in the second indictment would not have supported a conviction under the first, the offenses are not the same, and the second indictment is not barred. And he then gives numerous examples of variances between prosecutions and other illustrations of this rule of pleading and evidence, and in the note to the foregoing statement of the principle he cites many cases supporting it.

In the former appeal, referring to the variance and the motion to nonsuit, we said (169 N. C., at p. 320): "A variance cannot be taken advantage of by motion in arrest of judgment. *S. v. Foushee,* 117 N. C., 766; *S. v. Ashford,* 120 N. C., 588; *S. v. Jarvis,* 129 N. C., 698. It is waived if there is no objection to it before the verdict is rendered, as those cases show. But a motion to nonsuit is a proper method of raising the question as to a variance. It is based on the assertion, not that there is no proof of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has not been committed. In other words, the proof does not fit the allegation, and, therefore, leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide as matter of law that the State has failed in its proof. The judge should have sustained the motion and dismissed the indictment; but this will not prevent a conviction upon another indictment for obtaining the note by a false pretense, and this follows from what we have said. A party is indictable under Revisal, sec. 3433, for obtaining a signature to any written instrument the false making of which would be punishable as forgery. The evidence offered at the trial proved an indictable offense, but not the one alleged in the bill. We presume the solicitor will send a bill with averments agreeing with the proof he can make, and the court may hold the defendant to answer another indictment."

The former indictment charged that, by the false pretense, the defendant had obtained *money* from a certain person therein named, while the proof showed that he had not received any money from him, but a note signed by him; and we there stated the clear distinction, under our
(700) statute and according to the rules of correct criminal pleading, between the two charges.

By intendment fairly to be drawn from the present indictment, the defendant is charged with obtaining the signature and the note—not in so many words, but sufficiently to indicate with reasonable certainty such an accusation. It is necessary that the indictment should state the offense with reasonable certainly, that is, it must set forth the special manner of the whole fact so that it can be clearly seen what particular crime, and not merely what nature of crime, is intended to be alleged. This is required for several reasons:

1. To enable the court to say that, if the facts stated are true, an offense has been committed by the defendant.

2. To enable the court to know what punishment to impose in case of conviction.

3. To enable the court to confine the proof to the offense charged, so that the defendant may not be accused of one offense and convicted of another.

4. To give the defendant reasonable notice of the particular charge he will be called upon to answer, and enable him to properly prepare his defense.

5. To make it appear on the record of what particular offense the defendant was charged, for the purpose of review in case of conviction.

6. To so identify the offense that an acquittal or conviction may be pleaded in bar of a subsequent prosecution for the same offense. Clark's Cr. Procedure, p. 150.

The bill should have charged expressly and directly that by reason of the false pretense the defendant obtained *the note;* but while this would have been better pleading, we cannot say that it is so faulty in this respect as to be altogether bad, or so defective in statement as not to have informed the defendant of the particular charge preferred against him. We think it does do so, and that it alleges an offense different from the one charged in the first indictment and upon which he was formerly tried.

The court submitted an issue as to the identity of the evidence at the first and at the last trial; but this was not the question, whether the evidence was the same, but the real issue was whether the two offenses charged and tried were the same, and the record shows that they were not; and, furthermore, as matter of law, they are not the same. The two indictments, on their face, charge different offenses, the one that by reason of the false pretense he obtained $350 in money belonging to John D. Martin, and the other that he obtained the signature and, by clear intendment, the promissory note of William S. Martin; and the evidence at the last trial corresponded with the latter charge. It is also to be said that the former indictment charged that John D. Martin was the person misled and deceived by the false pretense, while (701) this indictment alleges that William S. Martin was so misled and deceived, and this shows a manifest difference between the two, as the parties defrauded are not the same.

After a careful examination of the record no error has been found.

No error.

Cited: S. v. Harbert, 185 N. C. 762 (p); *S. v. Harbert,* 185 N. C. 764 (j); *S. v. Crisp,* 188 N. C. 800 (2g, 3g, 5f); *S. v. Malpass,* 189 N. C. 355 (2p); *S. v. Harris,* 195 N. C. 307 (p); *S. v. Grace,* 196 N. C. 281 (p); *S. v. Jones,* 201 N. C. 426 (1g); *S. v. Franklin,* 204 N. C. 158 (p); *S. v. Pierce,* 208 N. C. 49 (2p); *S. v. Whitley,* 208 N. C. 662 (p); *S. v. Dills,* 210 N. C. 185 (2g); *S. v. Midgett,* 214 N. C. 109 (2g); *S. v.*

Lippard, 223 N. C. 170 (2g). (The parallel citations seem to refer to *S. v. Gibson*, 169 N. C., 318, declaring nonsuit for fatal variance to be proper.)

STATE v. T. R. TURNER.

(Filed 17 November, 1915.)

1. **Criminal Law—Municipal Courts—Chief of Police—Process.**

Where the statute provides that process of a municipal court "shall be issued by either the judge of said court or by the chief of police, the same to be issued on affidavit and returned forthwith to the court." the authority given the chief of police to issue process inferentially confers on him the power to pass upon the sufficiency of the complaint as basis for a warrant and to administer the oath before issuing the process.

2. **Criminal Law—Quashing Indictments—Process — Amendments — New Bill—Courts.**

A defective process may be amended by the court having charge of the criminal case wherein an arrest has been made; and when the indictment has been quashed, the defendant is not necessarily discharged, for the court, in its discretion, may hold him until a new warrant is served or a new bill is found.

3. **Criminal Law—Motions to Quash—Defects in Warrants—New Process —Courts.**

A motion to quash in arrest of judgment lies only for a defect on the face of the warrant or indictment, and upon objection to defective process or improper service the remedy is by abatement or motion to dismiss, and when allowed, the court will usually issue a correct warrant or have it legally served at once.

4. **Criminal Law—Appearance—Defective Process—Waiver.**

Irregularity of process in a criminal case is waived by the defendant appearing generally in an inferior court, and the objection cannot be taken after verdict nor in the Superior Court on appeal.

5. **Criminal Law—Appearance—Motions to Quash—Arrest of Judgment— No Offense Charged—Jurisdiction—Appeal and Error.**

Motions to quash and in arrest of judgment can only be entertained in the trial court after a general appearance of the defendant or the plea of not guilty, upon the ground that the matter charged does not constitute a criminal offense or to the court's jurisdiction; and this rule applies in appellate courts.

APPEAL by defendant from *Shaw, J.*, at September Term, 1915, of GUILFORD.

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

L. B. Williams and Thomas J. Gold for defendant.

CLARK, C. J. The defendant was convicted in the municipal (702) court of High Point for having liquor in his possession for sale, and appealed to the Superior Court. In the latter court he moved to quash the proceeding on the ground that the chief of police of High Point had no authority to take the affidavit of the complainant who applied for the warrant and signed as complainant, and, therefore, had no authority to issue the warrant. The defendant was again found guilty, and made the same motion in arrest of judgment. The sole exceptions are to the refusal to quash and the refusal to arrest the judgment.

There are several grounds on either of which the judgment was correct. Sec. 9, ch. 569, Public-Local Laws 1913, creating the court at High Point, provides: "All processes of said court shall be issued by either the judge of said court or by the chief of police, the same to be issued on affidavit and returnable forthwith to said court." The statute authorizing the chief of police to issue process inferentially confers on him the power to pass upon the sufficiency of the complaint as basis for a warrant and to administer the oath before issuing the process.

Even if one is wrongfully arrested on process that is defective, being in court, he would not be discharged, but the process would be amended then and there, or if the service were defective it could be served again. Whatever the rights of the defendant against the officer for service of an illegal process or insufficient service of a valid process, the defendant being in court, the matter will be corrected and the trial will proceed. Even when the indictment is quashed the court will not necessarily discharge the defendant, but in its discretion will hold him until a new warrant is served or a new bill is found. *S. v. Flowers,* 109 N. C., 844, citing numerous cases.

A motion to quash or in arrest of judgment lies only for a defect on the face of the warrant or indictment. When the objection is that the process is defective or improperly served the remedy is by abatement or motion to discharge, and if allowed the court will usually issue a correct warrant or have it legally served at once.

There is no defect here in the charge of the offense, and the defendant waived any objections to the regularity of the process by which he had been brought into court by appearing generally in the municipal court and going to trial. He could not take his chance of acquittal on a trial on the merits and, if convicted, urge that he was not in court. In both civil and criminal cases, if a party answers the complaint without objection to the process or its service, he waives all objection thereto. Still

less could this defendant take the objection after verdict nor on appeal in the Superior Court. The only object of service of process is to give the defendant notice of the charge, which this defendant has had.

In *S. v. Cale,* 150 N. C., 808, where "the warrant of the justice was unsigned and the deputation of the special officer was unwritten," (703) though the statute requires both signature and writing, *Hoke, J.,* said: "If a defendant voluntarily appears or is forcibly brought before a court having jurisdiction to hear and determine the cause, and such court does hear and decide it, whatever may be the rights of the defendant against the officer, in the absence of other objections, the defects suggested in the process do not in any way affect the validity of the judgment rendered," quoting from *Commonwealth v. Henry,* 61 Mass., 512, as follows: "As the magistrate had jurisdiction, and everything was right except the process, we are of the opinion that the defendant, by not objecting to the process while before the magistrate, waived all objections to it, and the ruling of the court is correct."

Even a motion to quash for a defect in the indictment cannot be claimed as a right after the plea of not guilty is entered. *S. v. Burnett,* 142 N. C., 579, and cases there cited. A motion in arrest of judgment could be made either in the trial court or on appeal in the Superior Court or in this Court. But it can be allowed only on two grounds: either that the matter charged does not constitute a criminal offense or that the court had no jurisdiction. Neither of which grounds can be maintained, nor, indeed, is charged in this case.

The judgment of the court below is

Affirmed.

WALKER J., dissents.

Cited: S. v. Harris, 213 N. C. 651 (3g, 4f, 5g); *S. v. McKeon,* 223 N. C. 405 (5g).

STATE v. GUSSIE HAND.

(Filed 17 November, 1915.)

1. Homicide—Defenses—Reasonable Apprehension—Assault.

A homicide is not excusable unless it reasonably appeared to the accused that the deceased intended to kill her or her child *in ventre sa mere,* or to do either of them great bodily harm; or that the assault upon her would have resulted in her death, or great bodily harm, or that of her child, the reasonableness of this apprehension being a question for the

jury under the evidence; and a homicide is not excused by the fear that a mere assault would be committed by the deceased at the time.

2. Homicide—Matters in Mitigation—Instructions—Inferences—Questions for Jury.

Where the accused, on trial for a homicide, relies upon the defense that the act was committed by her with reasonable apprehension of an assault by the deceased, etc., a prayer for instruction which sets forth the testimony relied upon and asks the court to instruct the jury to acquit the accused if such testimony is found by the jury to be true, leaving out of consideration the inferences to be drawn therefrom, is an improper one.

3. Instructions Requested—Erroneous in Part—Appeal and Error.

Where a part of a requested instruction is erroneous, it is not error for the trial judge to reject the whole.

4. Homicide—Deadly Weapon—Malice—Presumptions—Burden of Proof—Instructions.

The accused, on trial for homicide, has the burden upon him of proving matters in mitigation of the degree of the offense, when the homicide has been shown to have been committed by him with a deadly weapon; and under the circumstances of this case it is held that the trial judge correctly charged the jury that a provocation amounting to an assault would reduce the crime to manslaughter.

5. Homicide—Malice—Mitigating Facts—Lesser Offenses—Instructions.

Where if certain facts and circumstances upon a trial for homicide are found by the jury to be true, such as would remove the presumption of malice from the killing with a deadly weapon, a requested instruction predicated thereon, with direction to bring in a verdict of acquittal, should be refused, for the jury may convict of a lesser crime than murder.

6. Court's Discretion — Judgment Set Aside — Fair Trials — Appeal and Error.

The granting of motions to set aside a verdict as being contrary to the weight of the evidence, and also to give the accused an opportunity to try his case before an unbiased and unprejudiced jury, rests within the discretion of the trial judge, and is not reviewable on appeal.

7. Instructions—Evidence—Inferences—Speculation.

An instruction by the court that the jury should make its decisions upon what the witnesses say, "with proper inference and deduction by the use of your own sense and judgment from what they say or fail to say," is not objectionable on the ground that the jury were told to speculate or imagine what had occurred.

8. Homicide—Deceased Persons—Evidence.

One accused of a homicide is not forbidden to testify as to what occurred between the deceased and himself, constituting matters of defense, the rule regulating such evidence in civil actions not applying thereto.

APPEAL by defendant from *Rountree, J.*, at June Term, 1915, of (704) PENDER.

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

Bland & Bland, H. McClammy for prisoner.

CLARK, C. J. The prisoner was indicted for the murder of her brother. She was convicted of manslaughter and sentenced to two years in the State's Prison.

At the time of the homicide the accused and the deceased were living with her father. She was in the kitchen, while the deceased was on the back porch. He was shot with a shotgun, the load entering the neck in front, a little to the left. The testimony of Faybell Graham, a 12-year-old colored girl, who saw the transaction, a little condensed, is as follows: "I saw Pierce Jordan (the deceased) walking up and down the passage in the house, cussing. I was at the pump, as far as from there to the stove (about 18 feet). Miss Gussie fired the shot that killed Mr. Jordan. I saw her pick up the gun. The first time she went to the door she set down the gun and Elizabeth told her not to shoot.
(705) She went back to the table, and it was not long before she went back to the door, picked up the gun, and shot. Mr. Jordan was out there in the piazza all the time. She went to shut the door, and pushed him out and he came near falling, but steadied himself, and she shot him then. She was standing in the door inside the kitchen when she shot, and he was on the back piazza, cussing, at the time he was shot. They both were quarreling that morning when I got there. He was about as far from her as from here to that table (about 7 feet). She had a breech-loading gun setting by the kitchen table. Elizabeth was her little girl, not as big as I am. It was not long after she picked up the gun the first time and the time she shot. Mr. Jordan fell when she shot him, right straight down. She ran out to the road and told Miss Lizzie Jordan that she had killed him; I didn't hear any door burst open or anybody kick the door. I could see the door from where I was at the pump. I could look right into the window. The door was not kicked in as I knows of."

The accused pleaded self-defense and attempted to show by the testimony of herself and other witnesses that the deceased had cursed and threatened to kill her several times; that shortly before the homicide, and for about 1½ hours, he had been cursing and threatening her while he was in his room or walking up and down the passage; that she went in the kitchen and fastened the door, but that he came out to the porch, kicked open the kitchen door, and stepped across it with a pistol.

There was conflict of testimony as to this. The accused and her witnesses testified that the kitchen door showed by marks on it, by the broken latch and by the sprung door-facing, that it had been kicked

open, while the witnesses for the State testified that they saw no marks on the door; that there was no sign of the latch having been broken, and the bulge in the door-facing was an old defect; that the facing had bulged off, and there were spider webs where the facing had stayed open for a long time; there was no plastering on the floor.

The first prayer for instruction was properly refused, as it was predicated upon the proposition that the killing would be excusable if the deceased had advanced upon the accused "manifestly intending to commit an assault upon her," and if she had reasonable grounds to believe "an assault was about to be committed upon her." In order to excuse the taking of human life it must appear that the accused had reason to apprehend that the deceased intended to kill her or her child or to do either of them great bodily harm, or that the assault upon her would have resulted in her death or great bodily harm, or that of her child. *S. v. Clark,* 134 N. C., 704; *S. v. Dixon,* 75 N. C., 275. This view was submitted in the instruction given by the court. A homicide is not excused by fear that the deceased is about to commit a mere assault. (706)

The second prayer for instruction was properly refused, for it is well settled that the reasonableness of the apprehension is one of fact for the jury. *S. v. Blevins,* 138 N. C., 668; *S. v. Clark,* 134 N. C., 704.

The third prayer for instruction, while setting out a combination of acts and circumstances in testimony, attempted to withdraw from the jury the ultimate question of fact, whether the apprehension was a reasonable one, and to substitute an instruction that if those facts and circumstances were found to be true the jury should return a verdict of not guilty. If part of a prayer is erroneous, it is not error to reject the whole. *S. v. McDowell,* 145 N. C., 563.

It is well settled law that when the killing with a deadly weapon has been proven or admitted, the burden is on the prisoner to show excuse or mitigation. *S. v. Gaddy,* 166 N. C., 341; *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ib.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Brittain,* 89 N. C., 481. The court correctly charged the jury that a provocation amounting to an assault would reduce the crime to manslaughter. *S. v. McNeill,* 92 N. C., 812; *S. v. Smith,* 77 N. C., 488.

Assignments of error 4 and 5 are based on the refusal of the court to give the prayers 4 and 5 requested by the accused. In these prayers certain facts and circumstances in testimony are recited, with a request to charge that as a matter of law the presumption of malice would be rebutted and that the jury should return a verdict of not guilty. Even if part of the prayer were correct, that the presumption of malice would be rebutted, yet the instruction to return a verdict of not guilty would not necessarily follow; for while this might mitigate the offense to man-

slaughter, it would not excuse the homicide. Without malice unlawful homicide is manslaughter. *S. v. Baldwin,* 152 N. C., 822; *S. v. Lance,* 149 N. C., 551; *S. v. Hall,* 132 N. C., 1095; *S. v. Vines,* 93 N. C., 493.

The sixth prayer for instruction was defective, in that the court was requested to charge that certain facts appeared from all the evidence, when there was a clear conflict of testimony in regard to them.

The seventh assignment of error is for the refusal of the court to grant the motion to set aside the verdict upon the ground that it was contrary to the weight of evidence, and the last assignment of error is for the refusal of the court to set aside the verdict in order to give the accused an opportunity to try her case before a jury unbiased and unprejudiced. The granting or refusal of such motions rests in the discretion of the trial judge, and his action thereon is not reviewable. *S. v. Watkins,* 159 N. C., 480; *S. v. Pace, ib.,* 462; *S. v. Hancock,* 151 N. C., 699, and cases cited in these.

Assignments of error 8 and 9 are based upon the instruction of the court that the jury should make its decision "upon what the witnesses say, or what you believe of what they say, with proper inference and deduction by the use of your own sense of judgment from what
(707) they say or fail to say." This cannot be construed to mean that the jury were to speculate or imagine what had occurred. But it was simply committing the case to the jury upon the facts as they should find them to be, with proper inferences and deductions therefrom.

The accused was a woman, and in her father's house. She and the deceased were in a quarrel. There was evidence, if believed, indicating an intention to make an assault upon her. It was further in evidence that her child was born 18 days thereafter. We may well believe that under these circumstances the sympathies of the jury were on her side, and that they did not find that she was justified in killing the deceased with a breech-loading gun shows that the jury did not find any excuse or mitigation that would reduce the homicide to a less degree than manslaughter. The charge of the court was full and fair to her. All that was proper in the prayers was substantially given in the charge. The humane judge who tried the cause refused to set aside the verdict on the alleged ground that it was against the weight of the testimony, and limited the punishment to two years. This may be reduced materially by good conduct, or, if the facts justify it, a part or the whole of the sentence may be remitted, in the judgment of the Executive.

In homicide cases, unlike civil actions, the surviving party can testify, as the accused did testify in this case, in her own behalf, though the mouth of the other is closed by death.

Upon an examination of the exceptions relied on, we cannot see that any error was committed by the presiding judge.

No error.

Cited: S. v. Holland, 193 N. C. 718 (1f); *S. v. Kirkman,* 208 N. C. 722 (1f, 4g); *S. v. Robinson,* 213 N. C. 279 (1f, 4f).

STATE v. BEN RATLIFF.

(Filed 17 November, 1915.)

1. Indictment—Motion to Quash—Insufficiency—Seduction—Interpretation of Statutes.

Where an indictment for seduction under promise of marriage conforms with the statute except in the charge that the prosecutrix was an "innocent and virtuous" woman, omitting the word "and," the omission does not make the indictment fatally defective, for the expressions used supply the omission, and a motion to quash will be refused; and as a comma between the words "innocent" and "virtuous" would have the same effect, it would be the same as if the indictment had been imperfectly punctuated, which is not material. Revisal, secs. 3254, 3255.

2. Indictment—Sufficiency—Judgment—Motion in Arrest—Interpretation of Statutes.

A motion in arrest of judgment on the ground that the bill of indictment is defective will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. Revisal, sec. 3254.

APPEAL by defendant from *Rountree, J.,* at January Term, (708) 1915, of ANSON.

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

Robinson, Caudle & Pruette and John W. Gulledge for defendant.

CLARK, C. J. The defendant was convicted of seduction under promise of marriage. He moved in arrest of judgment upon the ground that the indictment, otherwise following in every respect the wording of this offense as defined in Revisal, 3354, omitted the word "and" by charging the presecutrix as "being an innocent virtuous woman," instead of "an innocent and virtuous woman" in the exact words of the statute.

Revisal, 3254, prescribes: "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 matters appear to enable the court to proceed to judgment."

Revisal, 3255, provides that no judgment upon any indictment for felony or misdemeanor, whether after verdict or by confession or otherwise, shall be stayed or reversed for the want of the averment of any unnecessary matter.

At the time when in the English courts 204 offenses were punished capitally the judges were moved by considerations of humanity to be astute in finding defects in indictments, or in process, in cases when defendants might be punished beyond their deserts. The reason has long since ceased, and our statutes have forbidden the courts to quash or to arrest judgment where the defect alleged is not prejudicial.

Chief Justice Ruffin in *S. v. Moses,* 13 N. C., 464, referring to these curative statutes, above cited, says: "Many sages of the law had before called nice objections of this sort a disease of the law and a reproach to the Bench, and lamented that they were bound down to strict and precise precedents. . . . We think the Legislature meant to disallow the whole of them." This case has been cited with approval in many cases, among them, in *S. v. Smith,* 63 N. C., 234, in which the Court said that these statutes have "received a very liberal construction, and their efficiency has reached and healed numerous defects in the substance as well as the form of indictments. . . . It is evident that the courts have looked with no favor on technical objections, and the Legislature has been moving in the same direction. The current is all one way, sweeping off by degrees 'informalities and refinements' until, indeed, a plain, intelligible, and explicit charge is all that is now required."

(709) The subject is fully discussed, with citation of many cases, in *S. v. Barnes,* 122 N. C., 1131, and in subsequent cases in the citations thereto in Anno. Ed.

A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *S. v. Francis,* 157 N. C., 612.

"The omission of a word which is not descriptive of the offense, and which does not affect the plain meaning of the indictment, is not fatal." 22 Cyc., 292; Bishop New Cr. Proc. (2 Ed.), sec. 354; 10 Enc. Pl. and Pr., 478.

The inadvertent omission of words not affecting the substance of the charge or prejudicing the defendant is not fatal. *S. v. Burke,* 108 N. C., 750, and cases there cited. The omission of the word "wound"

in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under Revisal, 3245. *S. v. Rinehart,* 75 N. C., 58. The omission of the word "year" in setting out the conditions of a lease was held to be a mere informality under the statute and not ground in arrest of judgment. *S. v. Walker,* 87 N. C., 541; *S. v. Lane,* 26 N. C., 113. In *S. v. Van Doran,* 109 N. C., 866, it was held that the use of "or" instead of "and" is not a defect unless it could be seen that it prejudiced the defendant.

The words "innocent virtuous" can have but one meaning, which is that the prosecutrix was "innocent and virtuous," it being clearly an elliptical expression. If a comma had been used it would have fully supplied the place of "and," and bad punctuation certainly does not vitiate an indictment any more than bad grammar.

The courts have long since passed the point where such objections as this can receive serious consideration. *S. v. Washington,* 13 S. C., 453; *Sheldon v. Lewis,* 97 Ill., 643; 22 Cyc., 291, and notes.

As the defendant had no exception on the merits or to any incident on the trial, either in the evidence or to the charge, or otherwise, it was possibly admissible for him to make an appeal for delay on this ground. The case, having been tried last January, should have been docketed here at the Spring Term, and this not having been done, the appeal should have been dismissed. The attention of solicitors and counsel was called to this matter, *S. v. Trull,* 169 N. C., at p. 369, in which we said that the statute regulating appeals must be complied with as to time—as in other respects.

The refusal to arrest judgment is

Affirmed.

Cited: S. v. Taylor, 172 N. C. 893 (2f); *S. v. Carpenter,* 173 N. C. 769 (2f); *S. v. Caylor,* 178 N. C. 810 (2f); *S. v. Howley,* 220 N. C. 117 (2f).

(710)

STATE v. HAZEL FREEZE.

(Filed 17 November, 1915.)

1. Constitutional Law—Criminal Law — Verdict — Prisoner's Presence — Waiver.

Where, on appeal from a conviction of larceny, error is assigned to the imposition of the sentence of the court, that neither the defendant nor his attorney was present at the rendering of the verdict, and had not been afforded opportunity to poll the jurors, as they were discharged, etc., it is *Held,* that to sustain the exception it is necessary that it be made to

appear whether the absence of the appellant or his attorney was voluntary, for in felonies less than capital, and in misdemeanors, the right to be present may be waived by the conduct or acts of the accused.

2. Appeal and Error—Unsupported Assignment—Record.

A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal.

APPEAL by defendant from *Lyon, J.*, at April Term, 1915, of GUILFORD.

Indictment for stealing a stack of hay. There was a verdict of guilty; judgment on the verdict, and defendant appealed on the alleged ground that he was not present at the time the verdict against him was rendered.

The case on appeal, agreed upon by counsel, after stating the indictment, plea, impaneling of the jury, evidence, verdict, and judgment and appeal, without exception or other statement appearing in the record, contains the following: "Defendant duly excepted to the verdict of the jury on the ground that neither he nor his attorney was present at the rendering of the verdict against him by the jury, and the defendant assigns as error that the verdict of the jury was rendered against him in the absence of both himself and his attorney, and that he had no opportunity whatever to poll the jury, as they were discharged before he or his attorney was informed of the verdict."

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

N. L. Eure for defendant.

HOKE, J. In *S. v. Cherry,* 154 N. C., pp. 624-626, in speaking of the right of a defendant to be present at different stages of the trial in capital and lesser felonies, this Court said: "It is the law of this State, a principle having prominent place in our Declaration of Rights, that in every criminal prosecution the defendant has the right to be informed of the accusation against him and to confront his accusers and (711) their witnesses. Applying the principle, this Court has held in several cases that in capital trials this right to be present in the court below cannot be waived, but that the presence of the prisoner is essential at all stages of the trial. In felonies less than capital, and in misdemeanors, the same right to be present exists, but may be voluntarily waived by the accused, a limitation being that in the case of felonies certainly this waiver may not be made by counsel unless expressly

authorized there to. *S. v. Jenkins,* 84 N. C., 812. The decisions are also to the effect that when the accused voluntarily absents himself, and more especially when he has fled the court, such conduct may be considered and construed as a waiver, and in that event the presence of the accused is not regarded as essential to a valid trial and conviction," citing *S. v. Pierce,* 123 N. C., 745; *S. v. Kelly,* 97 N. C., 404; *S. v. Paylor,* 89 N. C., 540; Clark's Criminal Procedure, p. 423.

It does not appear from the record that the absence of the defendant at the time the verdict was rendered against him was not voluntary on his part, and so amounting to a waiver of his right to be present within the principle of the above decision, save and except in his assignment of error. This being on defendant's own assertion, it has been held in numerous cases that the averments of such an assignment may not be considered in impeachment of the trial. *McLeod v. Gooch,* 162 N. C., 122; *Worley v. Logging Co.,* 157 N. C., pp. 490-499; *Patterson v. Mills,* 121 N. C., pp. 258-268; *Merrill v. Whitmire,* 110 N. C., pp. 367-370; *Lowe v. Elliott,* 107 N. C., pp. 718-719; *Walker v. Scott,* 106 N. C., pp. 56-61; 3 Ed. Clark's Code, sec. 550.

In most of these decisions the Court was passing on the consideration to be given to an assignment of error where the averments were not founded on a valid exception properly taken, but a perusal of these earlier cases will show that ordinarily the position also applies as to the *facts* stated in an exception taken by the appellant, when there is nothing in the record or statement of case on appeal to give them any support. This being true, there is nothing in the present record, apart from defendant's own statement in his exception, to show that the verdict was in fact rendered in defendant's absence.

Defendant has been convicted after a fair and impartial trial. The evidence fully supports the verdict, and no reason is shown why the judgment imposed by the court should not be carried out.

No error.

Cited: S. v. Foster, 172 N. C. 962 (2p); *S. v. Hartsfield,* 188 N. C. 361 (1p); *In re Will of Beard,* 202 N. C. 662 (2p); *S. v. Bittings,* 206 N. C. 800, 801 (2p); *S. v. Anderson,* 208 N. C. 789 (2p); *S. v. Parnell,* 214 N. C. 468 (2p); *S. v. Brown,* 218 N. C. 422 (2p).

(712)

STATE v. PRESS McRAE.

(Filed 24 November, 1915.)

Criminal Law—"Boarding-houses"—Proprietor or Manager—Interpretation of Statutes.

One who has not been licensed to keep a boarding-house, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boarding-house; and this case does not fall within the intent and meaning of the Revisal, sec. 3434a, making it an offense for one to obtain any "lodging, food, or accommodation at an inn, boarding-house, or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof." The word boarding-house, being used in connection with inns, etc., indicates that its use as such must be of the same general character, and the words "proprietor or manager" are not descriptive of the owner of a private dwelling.

APPEAL by defendant from *Devin, J.*, at April Term, 1915, of ANSON.

The defendant is indicted for a violation of section 3434 a of the Revisal, in that he obtained board without paying therefor, with intent to defraud.

The prosecutrix testified that the defendant boarded with her nine weeks, promising to pay her $2.50 per week, and that he left without paying her; that she lived a mile in the country and had not taken out a license to keep a boarding-house, and that she had never entertained any other person as a boarder.

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

There was a verdict of guilty, and from the judgment pronounced thereon the defendant appeals.

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

H. H. McLendon for defendant.

ALLEN, J. The statute (Revisal, 3434 a) does not make it indictable to obtain entertainment at a private house without paying therefor and with intent to defraud. The offense condemned, pertinent to this appeal, is obtaining any "lodging, food, or accommodation at an inn, boarding-house, or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof," and the question is presented as to whether one who has not taken out a license to keep a boarding-house, and who does not hold out her house as a place for the entertainment of the public, but who has on one occasion received one of the public for hire, is the keeper of a boarding-house. We think not.

The maxim *Noscitur a sociis,* which in ordinary speech means that you may know one by the company he keeps, is frequently resorted to in the interpretation of doubtful words in a statute, and when applied here, we find boarding-houses associated with inns and (713) lodging-houses, well known places of public entertainment, and the words "proprietor" and "manager" are not usually used as descriptive of the owner of a private dwelling.

The language of the statute, therefore, strongly implies that only such places are held out for the entertainment of the public are included within its protection, and the definition of a keeper of a boarding-house by *Associate Justice Hoke* in *Holstein v. Phillips,* 146 N. C., 370, as "one who reserves the right to select and choose his patrons, and takes them only by special arrangement, and usually for a definite time," excludes the idea that the entertainment of one person without the purpose or desire to entertain others comes within the description.

In *Cody v. McDowell,* 1 Lans. (N. Y.), 484, the Court, speaking to this question, says: "A boarding-house is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally is carried on and which is held out by the owner or keeper as a place where boarders are kept."

In that case it was held, where the plaintiff, who was a housekeeper but not accustomed to taking persons to board, received the defendant and his family, upon the defendant's application, into his house for an indefinite time, with the general understanding that the plaintiff was to be compensated for board and accommodation, that the plaintiff was not a boarding-house keeper. A private housekeeper who entertains a boarder for hire in a single instance is not a boarding-house keeper. A boarding-house is a *quasi*-public house where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind.

"A boarding-house is a house where the business of keeping boarders generally is carried on and which is held out by the owner or keeper as a place where boarders are kept." 4 A. and E., 590.

There is also another fatal objection to maintaining the prosecution, and that is that a failure to pay is not sufficient evidence of an intent to defraud. *S. v. Griffin,* 154 N. C., 611.

Reversed.

Cited: S. v. Barbee, 187 N. C. 704, 705 (g).

(714)

STATE v. G. W. BROWN.

(Filed 24 November, 1915.)

1. Constitutional Law—Police Powers—State Control—Federal Review.

The police power of a State is inherent in the State, and never having been granted to the Federal Government (IVth Amendment. Federal Constitution), and being in no wise curtailed by the XIVth Amendment to the Federal Constitution, the State laws and courts are not subject to review as to the form of indictment and the matters of criminal procedure.

2. Same—Intoxicating Liquors—Criminal Law — Indictment — Particular Persons Named.

Laws 1913, ch. 44, sec. 6, relating to intoxicating liquors, and providing that in an indictment for violating the act "it shall not be necessary to allege the sale to a particular person," is constitutional and valid, and not in contravention of the Federal Constitution. *Semble*, it would not be necessary to charge the sale to a particular person in the absence of statutory provision.

APPEAL by defendant from *Long, J.*, at March Term, 1915, of GASTON.

Attorney-General Bickett, Assistant Attorney-General Calvert, and S. J. Durham for the State.

Carpenter & Carpenter for defendant.

CLARK, C. J. The defendant was indicted for selling intoxicating liquors. The only question arises on an exception to the refusal of a motion in arrest of judgment upon the ground that the indictment was defective because it did not set out the name of the person to whom the liquor was sold.

Laws 1913, ch. 44, sec. 6, provides: "In indictments for violating this act it shall not be necessary to allege the sale to a particular person, and the violation of law may be proven by circumstantial evidence as well as by direct evidence."

In Black on Intoxicating Liquors, sec. 464, where the precedents are collected, the great weight of authority is that in indictments for the illegal sale of liquor it is not necessary (even without such statute) to name the persons to whom it was sold. In *S. v. Muse*, 20 N. C., 463, it was held that on an indictment for selling liquor near a church it was not necessary to name the vendee.

It has always been held that it was sufficient to charge the sale to have been made to "a person or persons to the jurors unknown." In *S. v. Tisdale*, 145 N. C., 422, it was held (by a divided Court) that while this might be done, the indictment was not sufficient, if the name

of the vendee was omitted, without an allegation that the name of the vendee was unknown to the jurors. It was in consequence of this, doubtless, that the provision of the law of 1913 above cited was enacted, which now provides that "It shall not be necessary to allege the sale to a particular person."

There is nothing that restricts the power of the Legislature to (715) so provide. In like manner, as to indictments for embezzlement, it is provided: "It shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded." Revisal, 3253.

Also, as to the offense of false pretense, Revisal, 3432, provides: "It shall be sufficient in any indictment for obtaining, or attempting to obtain any such property by false pretenses to allege that the party accused did the act with the intent to defraud, without alleging an intent to defraud any particular person; but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." This was sustained in *S. v. Ridge,* 125 N. C., 658; *S. v. Howard* (the "Gold Brick" case), 129 N. C., 660; *S. v. Taylor,* 131 N. C., 714, and the indictment was held sufficient in several other cases cited in Pell's Revisal under section 3432. *S. v. Burke,* 108 N. C., 750; *S. v. Skidmore,* 109 N. C., 796, and others.

In Revisal, 3435, it is provided as to indictments for disposing of mortgaged property: "In all indictments for violation of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made." As to yet other offenses there are similar provisions.

The police power is inherent in the original sovereignty of the State, and the XIVth Amendment in no wise curtails it. Brannon's XIVth Amendment, 107; *Strader v. Graham,* 10 How., 82; *Barbier v. Connelly,* 113 U. S., 27; *Powell v. Pennsylvania,* 127 U. S., 678.

The criminal jurisdiction was never granted to the Nation, and it is left to the States, both because never granted away and because the Xth Amendment provides that all powers not granted to the Federal Government are reserved to the States. *McElvain v. Brush,* 142 U. S., 155.

It has been often held that the State can, if its constitution permits, even dispense with an indictment for felony, and try on information. *Hurtado v. California,* 110 U. S., 537; *Bolln v. Nebraska,* 176 U. S., 86, and cases there cited; and this is true where the charge is for murder, as in *Caldwell v. Texas,* 137 U. S., 692; *Maxwell v. Dow, ib.,* 584.

A State may adopt such form of indictment, or even dispense with the indictment and with the finding of a grand jury, or prescribe what is necessary in any indictment or information. Brannon XIVth Amendment, 289; *Bergeman v. Backer,* 157 U. S. 655; *Moore v. Missouri,*

159 U. S., 673. Whether an indictment in a State court is sufficient to set out the charge is a matter for the State court, and presents no Federal question. *Moore v. Missouri,* 159 U. S., 673; *Howard v. North Carolina,* 191 U. S., 135, on writ of error from this Court, affirming *S. v. Howard* (the "Gold Brick case"), 129 N. C., 584. The above cases and others affirming the same principle, that the State laws (716) and State courts are not subject to review as to the forms of indictment and the methods of criminal procedure, have been cited and approved recently in *Frank v. Mangum,* 237 U. S., 309; see, also, Brannon XIVth Amendment, 417; *New York v. Eno,* 155 U. S., 89.

No error.

Cited: S. v. Hicks, 179 N. C. 734 (2f); *S. v. Lemons,* 182 N. C. 829 (2f); *S. v. Saleeby,* 183 N. C. 741 (2f); *S. v. Hedgecock,* 185 N. C. 718, 719 (2f).

STATE v. ED. WALKER AND JEFF. DORSETT.

(Filed 24 November, 1915.)

1. Homicide—Mistaking Deceased's Identity—Robbery—Evidence.

Where upon a trial for a homicide there is evidence tending to show that the defendants laid in wait along a country road in the dark of the evening and killed the deceased and robbed him; that he was driving a bay horse to a top buggy at the time, and that another person, an employee of a railroad, had been paid $125 by the railroad company at its usual time for paying off its employees, which custom was known in the city, a railroad center, it is competent to show that such employee also owned and drove a bay horse to a top buggy and had gone along the road ahead of the deceased, especially when there is evidence of declarations by the accused that they had missed their man, who had gone on ahead driving a bay horse.

2. Same—Motive.

Where the evidence upon a trial for murder tends to show that the accused in the dark of the evening killed the deceased under the mistake that he was another whom they intended to rob, it is not necessary that motive for the homicide be shown.

3. Homicide—Lying in Wait—Murder, First Degree—Concealment—Dark—Evidence.

For a homicide committed by "lying in wait" to be murder in the first degree it is not necessary that the accused should have concealed himself at the time, and it is sufficient if he placed himself alongside a country road after the dark of the evening, when he could not be recognized

by one eight or ten feet off, and killed the deceased while he was passing the place.

4. Homicide—Murder, First Degree—Evidence—Identity of Accused—Instructions—Trials.

Where all the facts in evidence tend to show that a murder in the first degree had been committed, and the issue of fact for the jury is only one of identity of the accused, a charge of the judge that the jury should return either a verdict in the first degree or acquit the accused, when the burden and degree of proof are properly placed and defined, is a correct one.

5. Same—Polling Jurors—Answers of Jurors.

Where the court has correctly charged the jury, upon the evidence, on a trial for homicide, that their verdict should find the accused "guilty of murder in the first degree or acquit him," and in rendering the verdict the foreman gave the answer "Guilty," and, replying to the question of the court, said "Guilty of murder in the first degree," and, upon polling the jury at the request of the prisoner, each juror answered "Guilty," without defendant's request for further reply, a judgment of guilty of murder in the first degree is properly entered.

APPEAL by prisoners from *Lyon, J.*, at April Term, 1915, of (717) GUILFORD.

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

Charles A. Hines for the prisoners.

CLARK, C. J. The prisoners were convicted of murder in the first degree of John Swain, who was shot between 6 and 7 o'clock on the evening of Wednesday, 20 January, 1915, and died from the wound on the following Saturday. The murder occurred about 1½ miles from the city of Greensboro, on the Ashboro-Pittsboro road just beyond the concrete bridge over Buffalo Creek.

Plunkett, a witness for the State, testified that he passed two men near the road, whom he took to be colored men; that Swain was 15 or 20 yards behind him, and as Swain got abreast of the men the witness heard a shout and, turning around, saw Swain jump out of the buggy, saw the flash of the pistol, heard its report and Swain screaming; that one of the men had Swain's horse by the bridle; headed him off, and then jammed him up against the fence; then they searched Swain, as well as he could see. They then turned and ran back towards Greensboro. There was much evidence by tracks, confessions, and otherwise, which it is not necessary to recapitulate, as the jury found it sufficient to identify the prisoners as the guilty parties, and there was no exception to the evidence except as herein stated.

The first five exceptions were to the admission of the testimony of Matt Rogers that he lived 200 or 300 yards beyond the bridge near which the murder occurred; that he drove a bay horse and top buggy and had been paid off the day of the murder, a little before noon, $125, by the railroad company, his employer, and to the testimony of R. A. Kirkman that the deceased drove a bay horse and a top buggy on his trips to town, and that the horse and buggy belonging to Rogers were like those of the deceased. It is urged by the prisoners that this testimony was incompetent because it was not shown that the prisoners knew that Rogers was an employee of the railroad and was paid off on the 20th of the month.

It was not necessary to conviction that the State should prove motive. *S. v. McDowell*, 145 N. C., 566; 1 Wharton Cr. Law (11 Ed.), 594. The fact that railroad employees were paid off in Greensboro on the 20th of each month, and that Rogers was a railroad employee and traveled that road with a horse and buggy like those of the deceased were circumstances, in connection with other evidence, to be considered, for actual knowledge need not be shown where there was opportunity to be informed, as that there was general information in Greensboro, which was a railroad center, that railroad employees were paid off on (718) the 20th of each month. Besides, the witness Jackson testified that the prisoner Dorsett when in jail told him that they had "missed their man; that he had a bay horse," and added: "The man we were after was ahead of the man we got; the man we aimed to get was in front."

The prisoners except to an instruction of the court: "If you find from this evidence, the burden being on the State to so satisfy you beyond a reasonable doubt, that the prisoners lay in wait on the night of 20 January, 1915, and shot the deceased, and from that wound he died; if you find that they willfully and intentionally shot him, and that they lay in wait for that purpose, the court charges you that it would be your duty to find them guilty of murder in the first degree."

The objection is that there was no evidence of lying in wait. The precedents show that while being in ambush would be lying in wait, it is not necessary that a person should be concealed. The testimony here is that the prisoners were waiting and watching for the deceased, or rather for some one whom they took the deceased to be, and that it was after 6 o'clock on 20 January, so dark that the witness Rives testified that while he could see the forms of the men, he could not see them well enough to recognize them, and the witness Plunkett says that though he passed within 8 or 10 feet of them, he could not distinctly recognize them. Waiting on the side of the road in the dusk, when it is too dark

to be recognized, for a man to shoot and rob is a sufficient "lying in wait" within the meaning of the charge of the court.

The court also charged the jury that it was their duty "to find the facts from the evidence, and there are only two verdicts you can render from the evidence in this case—a verdict of murder in the first degree, or a verdict of not guilt. There is no evidence of manslaughter; there is no evidence of murder in the second degree." In truth, the only question before the jury was as to the identity of the prisoners with the parties who committed the murder. If these were the men, they were guilty of murder in the first degree. Otherwise, they were not guilty. The jury upon the evidence submitted to them and under the charge of the court found beyond a reasonable doubt that the prisoners were the men who shot and killed John Swain.

Revisal, 3271, declares in part that the jury shall determine in their verdict whether the crime is murder in the first or second degree. In *S. v. Spivey,* 151 N. C., 676, the Court said: "When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of the prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty." To the same purport, *S. v. Covington,* 117 N. C., 834.

When the jury returned its verdict the foreman responded (719) "Guilty." The court asked: "Guilty of what?" He replied: "Guilty of murder in the first degree." The prisoners then demanded a poll. When the name of each juror was called he answered with a single word, "Guilty." The prisoners did not ask for a fuller reply.

"The verdict must be taken in connection with the charge of his Honor and the evidence in the case." *S. v. Gilchrist,* 113 N. C., 673. When the foreman had responded to the interrogatory of the court that his reply of "guilty" meant guilty of murder in the first degree, the response of "guilty" by the other jurors must be taken to mean the same, especially under the circumstances of this case, where the court had instructed the jury to return a verdict "either of murder in the first degree or of not guilty," and when there was no evidence either of murder in the second degree or of manslaughter—as, indeed, the court had told them. Indeed, the brief of the prisoners seems to admit the correctness of the charge by the court, that the jury could convict of only one offense, that of murder in the first degree. The sole question was that of identity, and the foreman having responded, in reply to the inquiry from the bench, that the verdict which he had rendered for the jury meant guilty of murder in the first degree, the response of the rest

of the jury, on being polled, that the prisoners were guilty, could have no other meaning. Any other interpretation would be a "refinement" and a miscarriage of justice.

No error.

Cited: S. v. Wiggins, 171 N. C. 818 (5f); *S. v. Wiseman,* 178 N. C. 790 (3f); *S. v. Smith,* 201 N. C. 497 (4g).

STATE v. JIM COOPER.

(Filed 1 December, 1915.)

1. Criminal Law—Evidence—Statements of Prisoner.

Voluntary statements, made by one accused of murder, to the officer arresting him for the crime are not incompetent simply because the accused was at the time in custody or in jail.

2. Same—Homicide—Declarations—Subsequent Statements.

Where the defense of insanity is relied upon on the trial by the prisoner accused of murder, testimony of the officers of what the prisoner said as to how the homicide was committed, and soon after the arrest, are competent upon the question of the mental condition of the prisoner at the time of the homicide, and such declarations are not confined to the exact time of the killing, or objectionable as hearsay evidence; but they must have been made by the prisoner at a time sufficiently close to the act to have some probative force in regard to his mental condition at the time.

3. Homicide—Insanity—Declarations — Evidence of Sanity — Subsequent Statements.

The defense of insanity being relied upon on a trial for murder, it is competent for the sheriff having the custody of the accused to testify, from what he had seen of the accused while in jail, his opinion of whether the accused knew right from wrong; and testimony of this character is not objectionable because it was not confined to the exact time of the killing.

4. Homicide—Insanity—Sufficiency of Evidence.

In order to render the defense of insanity available as a defense for committing murder, it must have been sufficient at the time of the homicide to render the accused incapable of understanding the nature and quality of the act he was about to commit or to distinguish between right and wrong, either generally or with reference to the particular act.

5. Instructions—Construed as a Whole — Crimnial Law — Findings Upon Evidence—Appeal and Error.

Where the trial judge has instructed the jury that one accused of murder must satisfy them from the evidence that he did not have mental

capacity to commit a crime, it is not error for him to have omitted the words "from the evidence," in a sentence to that effect immediately following; for the charge should be construed as a whole, in the connected way given to the jury, and upon the presumption that the jury will not overlook any portion of it.

APPEAL by defendant from *Shaw, J.*, at May Term, 1915, of (720) ROWAN.

Indictment for murder. The defendant was charged with the murder of Lucinda Price. It appears that he had a wife, who lived in Charlotte, and that he had for some time previous to the homicide been living in Salisbury with the deceased.

Lee Scott, a witness for the State, testified: "I am cousin to defendant, James Cooper; saw him on 28 March, this year, at Leroy Lyerly's house; Rose Smith and Lucinda Price were there; it was about 7 or 8 o'clock in the evening; Rose Smith was sitting next to the fireplace in the back room. Lucinda Price, the deceased, asked Jim Cooper why he did not go home; Jim said nothing; in about fifteen minutes James Cooper left; did not say anything; was gone about twenty minutes, and came back; came in the front door with a shotgun; stepped up into the door behind me. Lucinda Price, deceased, was near the door and was just getting up; she hollered and Jim Cooper shot her; she tried to run from him and was on the right side, close to the door. He shot her once. He ran out of the door and said nothing. I saw him next after he was arrested on Thursday; the killing was on Saturday. I never heard Jim Cooper and Lucinda Price talking together. I did hear him ask Lucinda if she was going to leave, two or three weeks before the killing. She lived about two or three minutes after he shot. I saw her after she died."

Claude Hoskin, witness for the State, testified substantially to the same facts.

The cross-examination of the witnesses for the State and the testimony of the defendant's witnesses indicated that the defense was insanity, and the prisoner was allowed the benefit of this plea.

The prisoner appealed from the judgment upon a verdict finding him guilty of murder in the first degree. (721)

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

A. H. Price and J. M. Waggoner for defendant.

WALKER, J., after stating the case: The first exception was taken to the testimony of the policeman, M. N. Earnhardt, who was allowed to

state what the defendant said to him after he was arrested and when the officer asked him "what he wanted to kill the woman for."

The third exception was taken to the testimony of the sheriff, as to the statement made by the defendant to him after his arrest.

Statements made to an officer are not incompetent simply because the defendant was at the time in custody or even in jail, if they are voluntary. *S. v. Exum,* 138 N. C., 600; *S. v. Homer,* 139 N. C., 603; *S. v. Bohanon,* 142 N. C., 695; *S. v. Smith,* 138 N. C., 700; *S. v. Jones,* 145 N. C., 466. Besides, this testimony was competent, as showing the state of the prisoner's mind at the time of the homicide, as words, acts, and conduct are competent for this purpose, they being natural evidence.

The prisoner objected to a question asked the sheriff by the solicitor: "From what you have seen of the defendant while in jail, state whether or not, in your opinion, he knows right from wrong." The ground of the objection was that the inquiry as to the defendant's mind should be confined to the time of the killing. "On a prosecution for murder, defended on the ground of insanity, evidence of acts, conduct, and declarations of the accused before and after as well as at the time of the commission of the act charged is competent, provided the inquiry does not call for evidence which is too remote." 21 Cyc., 948; 12 Cyc., 403; 1 Wharton's Cr. Ev. (10 Ed.), sec. 55, p. 236.

It is well settled that where the particular state of mind of a person is a relevant fact, declarations which indicate its existence are admissible as circumstantial evidence, and are considered as primary evidence, notwithstanding that the declarant is available as a witness. Within the bounds of relevancy, the declarations may precede, accompany, or follow the occurrence of the principal act. 16 Cyc., 1180, 1181, 1182. *Judge Brewer* said in *Mooney v. Olsen,* 22 Kansas, 69, 77: "A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances. So that it is generally true that whenever a party's state of mind is a subject of inquiry his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence." In *Waterman v.*
(722) *Whitney,* 11 N. Y., 157, which presents a careful analysis of this matter, *Justice Selden* says: "The difference is certainly very obvious between receiving the declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case it is

mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject, while in the latter it is the most direct and appropriate species of evidence." Declarations are competent not only to show insanity, but also weakness of the mental faculties. 16 Cyc., 1181. This Court, by *Smith, C. J.*, in *McLeary v. Norment,* 84 N. C., 235, 237, states the rule very clearly and the reasons underlying it. It was there objected that an interested witness could not testify to such declarations being excluded by C. C. P., sec. 343 (Code of 1883, sec. 590; Revisal of 1905, sec. 1631), and the Court met the objection in this way: "The conversations offered are not to prove any fact stated or implied, but the mental condition of the plaintiff, as declarations are received to show the presence of disease in the physical system. How, except through observation of the acts and utterances of a person, can you arrive at a knowledge of his health of body or mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must any conclusion of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. Would it not be competent to show an attempt at self-destruction? And do not foolish and irrational utterances equally tend to show the loss of reason when proceeding from the same person? In either case the conduct and the language may be feigned and insincere; but this will only require a more careful scrutiny of the evidence, and does not require its total rejection."

How better can we judge of a man's physical or mental state than by what he says or what he does? Greenleaf on Evidence (Redf. Ed.), sec. 102, says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence; and whether they were real or feigned is for the jury to determine." *Lord Justice Mellish* held that such evidence was admissible, not under the *res gestæ* notion, nor as original evidence, but as a distinct exception to the hearsay rule. The subject is fully reviewed in *Jacobi v. State,* 133 Ala., at p. 14, by *Chief Justice McClellan,* who quotes the neat phrase of *Lord Justice Bowen:* "The state of a man's mind is as much a fact as the state of his digestion," and may be proved by any declarations indicative of mental or bodily health or infirmity. The exception to the hearsay rule is admitted, we presume, because of (723) necessity in making proof of the fact and the difficulty of showing it otherwise, or because it may be considered as natural evidence, and reliable, if sincere and not feigned, of which the jury must judge.

If it should appear that the declarations are not genuinely expressive of the mental or physicial condition, they would, of course, be disregarded.

The declarations must have been made at a time sufficiently close to the principal occurrence as to have some probative force in regard to the mental condition of the person who committed the act or whose sanity is in question.

There is some testimony in this case that the defendant had been having something like epileptic attacks and that he was subject to fits, which had weakened his faculties, and that just before he assaulted the woman with his gun and killed her he was not in his normal condition of mind, but was rather sullen and morose, acted "curiously," and was indifferent to his surroundings. There was also testimony, coming from his own witnesses, that after the intimacy between him and the woman had ceased, and they had stopped living together, he became silent, sullen, and indifferent, and that he killed her shortly after the two had fallen out with each other and just after the deceased had asked him why he did not go home.

One who is so insane as to be incapable of having a criminal intent, which is one of the essential ingredients of crime, is not, in law, responsible criminally for his acts, want of sufficient mental capacity to form such intent being a complete defense and not merely a mitigating circumstance; but in order to be available as a defense the insanity, or want of mental capacity, must exist at the time the act is committed. 12 Cyc., 164, 165. It is said at the latter page: "Where a person becomes insane after commission of a crime, he cannot be tried while in such condition, but such insanity does not exempt him from responsibility and prosecution if he afterward becomes sane again. The former insanity of the accused does not excuse his crime if it appears that he recovered from it previously to the commission of the crime; but in the absence of such proof it will be presumed to be continuous to the time of the crime. The law does not require that the insanity shall have existed for any definite period, but only that it shall have existed at the precise moment when the act occurred with which the accused stands charged." Again, the insanity must render the person incapable of understanding the nature and quality of the act he is about to commit or of distinguishing between right and wrong, either generally or with reference to the particular act. 12 Cyc., 165. While a slight departure from a well balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high
(724) crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment. 109 Pa. St., 262, 271.

The Court, in *S. v. Brandon,* 53 N. C., 463, 467, after referring to the defense set up by the prisoner in that case, that he was under the influence of a superior and irresistible moral power or supernatural force which destroyed his free agency, said: "It assumes that the accused knew the nature of his act, and that it was wrong. The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one, but which, nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome; otherwise it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons, indeed, deeming themselves incapable of exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions. To excuse one from criminal responsibility the mind must, in the language of the judge below, be insane. The accused should be in such a state from mental disease as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, and this should be clearly established. This test, a knowledge of right and wrong, has long been resorted to as a general criterion for deciding upon legal accountability, and, with a restricted application to the act then about to be committed, is approved by the highest authorities. But we do not undertake to lay down any rule of universal application."

The charge of the court upon this phase of the case—the insanity of the prisoner at the time he killed the woman—was clear and full, and conformed to the rule we have stated.

The prisoner excepted to an instruction of the court to the effect that if he had failed to satisfy the jury that he did not have mental capacity sufficient to commit a crime the verdict would be guilty, the particular objection being that the court should have said if he had failed to satisfy the jury "from the evidence" of his mental incapacity he should be convicted; but, in the sentence immediately preceding, the court had instructed the jury that "If the defendant has satisfied you *from the evidence* that he did not have sufficient mental capacity to commit a crime, he should be acquitted." The two instructions are so intimately connected with each other that no intelligent jury could have misunderstood what was meant, nor can we reasonably suppose that they would find the fact one way or the other without any evidence, or (725) otherwise than "from the evidence." The charge of the court

must be considered as a whole, in the same connected way as given to the jury, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, there is no ground for reversing the judgment, though some of the expressions, when standing alone, may be regarded as erroneous. *Kornegay v. R. R.*, 154 N. C., 389; *S. v. Robertson*, 166 N. C. 356; *S. v. Lance*, 149 N. C., 551; *McNeill v. R. R.*, 167 N. C., 390; Thompson on Trials, sec. 2407.

We believe that this covers all the exceptions taken at the trial to the rulings of the court and the charge, and in none of them do we find any ground for a reversal.

No error.

Cited: McCurry v. Purgason, 170 N. C. 467 (5g); *S. v. Killian*, 173 N. C. 795 (5g); *S. v. Orr*, 175 N. C. 777 (5g); *White v. Hines*, 182 N. C. 280 (2g); *S. v. Hairston*, 222 N. C. 461 (4g); *S. v. Hairston*, 222 N. C. 462 (5g); *S. v. Matthews*, 226 N. C. 642 (4g); *S. v. Swink*, 229 N. C. 125 (4g).

STATE v. JOHN EARNHARDT.

(Filed 17 November, 1915.)

Convicts—Persons in Charge—Judgment—Clothing—Felony—Interpretation of Statutes.

In order to convict a superintendent of convicts, or other person in charge, of a violation of section 4, chapter 64, Laws 1911, making it unlawful to work persons convicted of felony in other than a uniform of a felon, or clothe a person convicted of a misdemeanor in the uniform of a felon, it is necessary that the judge imposing the sentence designate in the judgment whether the person was convicted of a felony or misdemeanor, or the kind of clothes the convict should wear; and where the judge has failed to do so, the one in charge of the person convicted is not indictable when the conviction is for manslaughter, though a well known felony, and the prisoner is not clothed in the garb required for one guilty of this offense. The rules for interpretation discussed and applied by WALKER, J.

HOKE, J., did not sit on the hearing of this case. CLARK, C. J., dissenting.

APPEAL by the State from *Carter, J.*, at July Term, 1915, of STANLY.

Criminal action. Defendant, John Earnhardt, was indicted in the Superior Court for having worked Walter J. Kennedy on the chain-gang of the township mentioned in the indictment without requiring him to

wear the uniform of a convicted felon, contrary to the statute, and was tried at said term, whereupon the jury returned a special verdict as follows:

"1. At November Term, 1914, of Stanly Superior Court, W. J. Kennedy was duly convicted of manslaughter and sentenced to work for a term of six years on the chain-gang for North and South Albemarle townships.

"2. On or about 13 May, 1915, W. J. Kennedy was turned over (726) to the chain-gang and began working out his sentence, and has worked on the chain-gang continuously since said date.

"3. John Earnhardt, the defendant above named, is the superintendent in charge of the chain-gang and also in charge of W. J. Kennedy, and has been working W. J. Kennedy on the chain-gang ever since the resignation of N. C. Cranford, superintendent.

"4. John Earnhardt, superintendent of said chain-gang, has not required W. J. Kennedy to wear the uniform prescribed to be worn by felons, and that W. J. Kennedy has not worn said uniform, but has been permitted to wear citizen's clothes, although John Earnhardt has been notified of chapter 64, Public Laws 1911.

"5. North and South Albemarle townships' chain-gang was duly created by chapter 33, Public-Local Laws of North Carolina, Session 1913, and that the laws governing the working of convicts on said chain-gang are as prescribed therein and in chapter 71 of Private Laws, Session 1907, creating the Albemarle chain-gang, and the general law of the State.

"6. That a copy of the judgment of the court sentencing W. J. Kennedy is hereto attached and made a part of the facts as found by the jury.

"If upon the foregoing facts the court be of the opinion that the defendant is guilty, the jury so find; otherwise, they find him not guilty.

"Upon the foregoing special verdict of the jury, the court being of opinion that the defendant was not guilty, so adjudged, whereupon the State appealed after having duly excepted."

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

Robert L. Smith for defendant.

WALKER, J., after stating the case: The judgment of the court did not require that W. J. Kennedy, who was convicted of manslaughter and sentenced to six years at hard labor in the penitentiary, should wear the uniform of a felon while at work, which defendant in this action con-

tends was necessary to be stated in the judgment against Kennedy in order to make him criminally liable for not requiring him to do so.

Public Laws 1911, ch. 64, sec. 4, provides, "That it shall be unlawful to work persons convicted of a felony in other than the uniform of a felon, or to clothe a person convicted of a misdemeanor in the uniform of a felon." And section 5 provides that "Any superintendent of convicts, or other person in authority, who shall violate this law shall be guilty of a misdemeanor," and fined or imprisoned, or both, in the discretion of the court, and liable in damages to the party aggrieved.
(727) The first section of the chapter makes it the duty of "the several judicial officers of the State, in assigning any person to work the public roads of a county, to designate in each judgment that such as may be convicted of a felony shall wear felons' stripes, and such as are convicted of a misdemeanor shall not wear stripes." The statute further provides that the State Prison Board shall prescribe uniforms to be worn by persons convicted of felonies and those convicted of misdemeanors, which shall be different and easily distinguishable, with the discretion to allow persons convicted of a misdemeanor to wear plain clothes "similar to those" of an ordinary citizen.

As the judge did not designate in the sentence of W. J. Kennedy in what manner he should be clothed when at work on the chain-gang, it is contended by the defendant, and denied by the State, that the omission of this direction is fatal to the further prosecution of the case. The question, therefore, is whether this provision of the statute is mandatory or merely directory. Our opinion is that it is mandatory, and the decision as to the nature of the offense is confined to the judge, and not left to the defendant's keeper. It is common learning that a statute must be so construed as to give effect to the presumed and reasonably probable intention of the Legislature and so as to effectuate that intention and the object for which is was passed. Where it is clearly worded, so that it is free from ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what policy was intended to be declared (*Lewis v. U. S.*, 92 U. S., 618; *Lake County v. Rollins*, 130 U. S., 662; *B. R. Co. v. Sulzberger*, 157 U. S., 1); but where it admits of more than one construction, or is doubtful of meaning, uncertain, or ambiguous, it is not to be construed only by its exact language, but by its apparent general purpose, that meaning being adopted which will best serve to execute the design and purpose of the act, for a thing within the intention is as much within the statute as if it were within the letter. *Wood v. U. S.*, 16 Peters, 342; *Bernier v. Bernier*, 147 U. S., 242; *Smythe v. Fiske*, 23 Wall., 374; *Fortune v. Comrs.*, 140 N. C., 322; *McLeod v. Comrs.*, 148 N. C., 85. There are other principles of statutory construction, which are, that technical rules as to the force or

meaning of particular terms must yield to the clear expression of the Legislature's paramount will; and a construction of a statute should not be adopted, if the words will permit, which will lead to evil, unjust, oppressive, or absurd consequences, or those in direct violation of its own provisions. Endlich on Int. of Statutes, 258 and note, 264 and 267; *U. S. v. Freeman,* 3 How., 556; *Hurdekoper v. Douglass,* 3 Cranche, 1; *Hawaii v. Mankiche,* 190 U. S., 197; *U. S. v. Kirby,* 7 Wall., 482; *Oates v. First Natl. Bank,* 100 U. S., 239. The statute, in other words, should be construed sensibly; and in order to make sure of the true intent, the meaning of words, or phrases may be extended or narrowed or additional terms implied, or it may be presumed that (728) the Legislature intended exceptions to its language, where this is necessary to be done in order to enforce the evident purpose; but this is all subject to the general restriction that the meaning is to be ascertained from the words of the statute and the subject-matter to which it relates. *U. S. v. Brewer,* 3 How., 556; *Brewer v. Blougher,* 14 Peters, 178; *U. S. v. Kirby,* 7 Wall., 482; *U. S. v. Goldenberg,* 168 U. S., 95; *Gardner v. Collins,* 2 Peters, 58; Endlich on Int. of Statutes (Ed. 1888), p. 7. Finally, the statute should receive a strict or a liberal construction as the one or the other will execute the real intention as manifested by the words, the paramount duty of the judicial interpreter being to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. Endlich, p. 452.

If we are guided by these general rules, we will find that the Legislature evidently intended to have the judge, in his sentence, determine the nature of the crime, whether a felony or a misdemeanor, as it is well known that the persons who have charge of chain-gangs are generally laymen, and consequently not able to draw distinctions between the different crimes with respect to their degrees, whether felonies or not. It was not intended that the officer, unskilled in such matters, should be required to determine, at his peril, the nature of any particular offense charged against the person committed to his custody, nor that any mistake should be made and a wrong thereby done to the convict. What other purpose could the Legislature have had in view when this provision was inserted in the statute? As there could have been none other, it must be considered as an essential part of the judgment, and as one necessary to determine the authority vested in the superintendent of the chain-gang with respect to the kind of clothes to be worn by the convict. Can it be supposed that the Legislature intended to visit such heavy punishment upon the officer having the convict in charge if he should, by any error of judgment as to the law, degrade his prisoner by clothing him with a felon's garb in violation of the statute, and also to subject him to an action for damages where there is no intentional

wrong-doing on his part? It would be unreasonable to impute such a purpose to the legislative body, and more in accord with a proper construction of the statute to hold that it was intended as a protection both to the officer and the convict, and as authorizing the former to use the clothes prescribed for a misdemeanant unless it is otherwise adjudged by the court. We cannot say that when the Legislature has positively directed a thing to be done by one person, and a very proper one to do it, by reason of his supposed learning, and superior understanding of such matters, and, too, that it should be done in a given way, it can be done by another person in some other and different way. This would (729) be opposed to every rule of construction we know of, and might defeat the beneficent purpose of the law.

The defendant further contends that neither the board of county commissioners nor the highway commission, having management and control of the roads in North and South Albemarle townships (Pub. Laws 1913, ch. 33), has provided for the uniforms to be used for the purpose designated in the statute. But we need not decide as to whether this is a legal excuse for the defendant, as our opinion is that the omission of the court to direct, in its judgment against W. J. Kennedy, how he should be clothed is fatal to this prosecution.

The designation of what kind of clothes a convict shall wear is made by chapter 64, sec. 1, Public Laws 1911, as much a part of the judgment as the designation of the kind of punishment the convict shall suffer for the crime he has committed, so far as to prohibit an officer from degrading him with a "felon's stripes" unless so authorized to do by the judgment. This being so, the State has failed to charge, or to show, that the defendant has violated any provision of that statute or of any other law, and the judgment of the court upon the special verdict was therefore correct.

In this view of the law the contention of the State in this Court, so strongly presented by the Attorney-General, that the officer must decide this question for himself and at his peril, especially where the offense of which he has been convicted is a well known felony, as is manslaughter, cannot be sustained, for if we should so hold, the very purpose of the statute would be contravened, if not defeated, as it was intended to afford a double protection—one to the convict, in order that he may be spared the humiliation and degradation of stripes and of being constantly reminded of his infamy, and the other to the officer, that he may not be subjected to indictment or a civil action for damages by his own misapprehension as to the legal character of the offense committed, whether a misdemeanor or a felony, he, perhaps, being, as we have said, only a layman and having no professional knowledge of the law.

For the reasons stated we affirm the judgment.
Affirmed.

HOKE, J., not sitting.

CLARK, C. J., dissenting: Laws 1911, ch. 64, sec. 4, provides that "It shall be unlawful to work persons convicted of felony in other than the uniform of a felon, or to clothe a person convicted of a misdemeanor in the uniform of a felon." Section 5 provides: "Any superintendent of convicts, or other person in authority, who shall violate this law shall be guilty of a misdemeanor." The defendant violated this law by working the person "convicted of a felony in other than the uniform of a felon," and it follows that he was guilty of a misdemeanor. It is true that another section of the same chapter requires that the (730) "judicial officers of the State, in assigning any person to work the public roads of a county, shall designate in each judgment that such as may be convicted of a felony shall wear a felon's stripes." But this is simply a direction to the judges, for which if they do not obey they are responsible; but it is not made a condition precedent or a guide as to the officers whose duty in regard to clothing a convict is set out in sections 4 and 5.

Whether a convict is a felon or not is a matter of knowledge easily accessible to such officers, who must look to the mittimus for a description of the offense for which each person has been committed to their charge. Whether such offense is a felony or not is a matter of law, and "Every one is presumed to know the law." It is the duty of those in charge of convicts to ascertain the law and obey it. If they fail to do so, they have violated the law and are subject to the prescribed penalty. The special verdict finds that the defendant did not require the convict in this case, who was a felon, to wear the dress prescribed for felons.

Such officers are not excused because the judges have not obeyed another section of the act in wording their judgments. The duty prescribed by sections 4 and 5 for those in charge of convicts is not made dependent in any respect upon the judges observing the requirement that they should add certain matters to their judgments. As already said, that is not made a condition precedent by this statute. Whether a convict is a felon or not does not depend upon the wording of the judgment, but solely on the crime for which each prisoner has been convicted. *S. v. Fesperman,* 108 N. C., 770.

Upon the special verdict the defendant should have been adjudged guilty.

Cited: Board of Agriculture v. Drainage District, 177 N. C. 226 (g); *S. v. Barksdale,* 181 N. C. 625 (g); *Hagood v. Doughton,* 195 N. C.

819 (g); *Machinery Co. v. Sellers,* 197 N. C. 31 (g); *S. v. Humphries,* 210 N. C. 410 (g); *S. v. Whitehurst,* 212 N. C. 303 (g); *Blassingame v. Asbestos Co.,* 217 N. C. 234 (g); *Raleigh v. Jordan,* 218 N. C. 58 (j); *Raleigh v. Bank,* 223 N. C. 290 (g); *Young v. Whitehall Co.,* 229 N. C. 367 (g).

STATE v. ERNEST LOWRY AND GEORGE POSTON.

(Filed 1 December, 1915.)

1. Homicide—Confessions—Threats of Lynching—Consequent Facts.

Confessions of murder made by the accused, under threats of lynching, of which he was aware, will not be received in evidence against him on the trial, though incriminating matters brought to light in consequence thereof are competent, as, in this case, where robbery as well as a homicide was committed, the finding of identified money, the bloody stick used, and the stem and roots of the bush from which the stick had been cut, bearing upon other evidence tending to fix the crime upon the accused.

2. Homicide—Evidence—Voluntary Confessions.

Voluntary confessions of murder made by the accused to the officer in charge, while in jail, are competent evidence against him on the trial; and this rule of evidence is not affected by the fact that the prisoner had previously made confessions, in another State, of the crime, when threatened with being lynched there.

3. Same—Several Prisoners—Competency as to Each.

Voluntary confessions made by two prisoners accused of murder are competent as evidence upon the trial when confined by the court to the prisoner making them, or made by one in the presence of the other.

4. Court's Discretion—Separation of Witnesses—Witness Not Separated—Evidence.

Where the court has ordered the witnesses separated on the trial for a homicide, and permits a witness for the State to remain in the courtroom while the others were testifying, and then give his evidence, the act of the court in so doing is a matter within its discretion, and not reviewable on appeal.

5. Evidence—Footprints—Admissions—Corroboration.

Evidence of the identity of tracks made at the scene of the crime with those made by the accused, being tried for murder, is competent, especially when corroborated by his confession.

6. Evidence—Motions to Strike Out—Appeal and Error—Objections and Exceptions—Court's Discretion.

It was discretionary with the trial judge to refuse to strike out testimony which has been admitted without objection, on the ground urged

for error; and where money had been found at a certain house in consequence of a confession previously made by the prisoner on trial for murder, and the fact was relevant to the inquiry, a question asked by the court, assuming that the prisoner hid it there, and without objection at the time, except on a different ground than that urged on appeal, will not be held as reversible error.

APPEAL by defendants from *Lane, J.*, at May Term, 1915, of (731) GASTON.

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

Bulwinkle & Cherry and G. B. Mason for prisoners.

CLARK, C. J. The prisoners were convicted of the murder, in the first degree, of Grant Davis on Sunday afternoon, 7 March, 1915. There was evidence that the deceased shortly before the homicide had received money for his cotton crop, part of it in new bills of the King's Mountain Bank; that the prisoners had been at his house shortly before the day of the murder, and that on the afternoon of the homicide the deceased, with $300 on his person, left his house with one John Adams; that John Adams, as was testified by him and others, parted from the deceased before the prisoners met him, and he was seen no more alive; his body being discovered on Wednesday concealed in a brush pile, to which it had been dragged, with his head badly beaten in. There was no money on the body when found, except 15 cents. There were two tracks besides those of the deceased going to the place of homicide, which tracks were identified as those of the prisoners. The prisoners confessed that the tracks were made by them, and that he was killed by one (732) of them with a stick, the other holding the deceased. They told where they had cut the stick and where they had hidden it behind a log, and in consequence of this information the officers found and brought into court the stump from which the stick had been cut, and also found the stick where they said that it was hidden, with human blood on it. The prisoners on the night of the next day (Monday) took the train and were seen in the possession of considerable money when they bought their tickets, though their employers testified that they had no money, but had borrowed a small sum the day before from them. It was also in evidence that the prisoners had each given $10 apiece in new bills to their wives, which was found in the possession of the wives. The prisoners were pursued and found at Armour, Ga., and made confessions, which, however, the judge ruled out, as there was evidence that threats of lynching had been made, to the knowledge of the prisoners. But the court permitted the officers to testify that in consequence of what was said they found $60

hidden under a mattress in a house, which consisted of new bills of the Bank of King's Mountain, and they also found other money on the persons of the prisoners, who each had bought a watch and new clothes. On the way back, at Atlanta, Ga., and at Spartanburg, there were some threats made by bystanders. After the prisoners were lodged in the Gaston County jail they confessed to the murder and attendant circumstances to an officer, without any threats or inducements on his part, and they also made confessions as to the tracks and stick, cutting and hiding the stick with which the murder was committed and the commission of the murder, to a fortune-teller who was in jail with them, which coincided, as above stated, with the facts on investigation; and there was testimony of another prisoner in jail to confessions by both these prisoners.

The judge instructed the jury, as to these confessions, that they were only competent against the person making them, the other not being present at the time. Both prisoners made confessions which were held competent only against the party making it. But there were also confessions made when both prisoners were present, and these were admitted. There was in evidence confessions to John Adams before the prisoners left for Georgia.

The prisoners did not testify in their own behalf and did not introduce any evidence. The prisoners contended, first, that the finding of the money in consequence of the confessions at Armour, Ga., which confessions were ruled out on account of threats by bystanders, rendered incompetent the evidence of the officers that they found the money hidden in the house; and they made the same objection as to the evidence that in consequence of the confessions in the jail at Gastonia the
(733) officers followed the tracks and found the bloody stick and the stump from which it had been cut.

Aside from the fact that the latter confessions were voluntary, it has been held uniformly in this Court that though confessions made in consequence of threats or inducements must be excluded, this does not render incompetent the discovery of incriminating evidence in consequence of such confessions.

"Where an involuntary confession discloses incriminating evidence which is subsequently on investigation proved to be true, or where the confession leads to the discovery of facts which in themselves are incriminating, so much of the confession as discloses the incriminating evidence and relates directly thereto is admissible. And the facts discovered in consequence of such involuntary confession may be proved." 12 Cyc., 478. In *S. v. Graham,* 74 N. C., 646, where the prisoner had been compelled by the officer to put his foot in the tracks, it was held competent to prove that his foot fitted the tracks perfectly, the Court

saying: "The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by these motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the cornfield. This resemblance was a fact calculated to aid the jury, and fit for their consideration. Evidence of this sort is called by the civilians 'real evidence,' is always admissible, and is of greater or less value according to the circumstances." This has always been held in this State, and indeed everywhere.

S. v. Graham, supra, has been often cited and approved, among other cases, in *S. v. Lindsey,* 78 N. C., 501, where it was held that though a confession might be excluded on account of duress, it was competent to show that in consequence of what the defendant said the officer found the stolen property at the point mentioned, as finding the money under the mattress in this case.

In *S. v. Winston,* 116 N. C., 992, it was held that "this doctrine is well settled in this State." *S. v. Graham* was also quoted in *S. v. Mallet,* 125 N. C., 725, which case on writ of error was approved by the United States Supreme Court in *Mallett v. North Carolina,* 181 U. S., 589, which cites *S. v. Graham, supra,* with approval. This United States decision is printed in 128 N. C., 619.

The same doctrine was stated in *S. v. Moore,* 2 N. C., 483; *S. v. Garrett,* 71 N. C., 85, and in many other cases, among them as recently as *S. v. Thompson,* 161 N. C., 241.

The prisoners also except to the declarations made to the officer (734) in the jail after the return of the prisoners because of the threats made down in Georgia. The Georgia confessions were ruled out. But the confessions in Gastonia were voluntary and competent, and there is nothing that refers them to fear caused by what happened in Georgia. Indeed, while in jail the prisoners made full confession to the fortune-teller and also to another prisoner.

The prisoners also except because after the court had made an order that no witness for the State or for the prisoners should be allowed in the courtroom during the trial, a witness for the State who remained in the courtroom was permitted to testify. The prisoners moved for a nonsuit on that ground, and also to set aside the verdict, and excepted to the denial of these motions. But it is a matter in the discretion of the court whether such witness shall be examined or not. 12 Cyc., 547. The same point was made in *S. v. Hodge,* 142 N. C., 676, and it was

held that this was a matter which rested in the discretion of the presiding judge. The same ruling was made in *S. v. Sparrow,* 7 N. C., 487, and *Purnell v. Purnell,* 89 N. C., 44, and is stated as settled law in the text-books, 1 Greenleaf Ev., secs. 431 and 432 and notes, and 2 Bishop New Criminal Proceedings (2 Ed.), secs. 1191 to 1193 a.

The confessions made to the officer at Gastonia, being voluntary, were not incompetent merely because the prisoners were in custody or in jail, and not even if they had been in handcuffs, which does not appear to have been the case here. *S. v. Whitfield,* 109 N. C., 876, citing several cases, and which has been cited since with approval in *S. v. Edwards,* 126 N. C., 1052; *S. v. Horner,* 139 N. C., 606. To same effect, *S. v. Smith,* 138 N. C., 700; *S. v. Bohanon, ib.,* 695; *S. v. Jones,* 145 N. C., 466, and many others.

Evidence as to the identity of tracks was competent. *S. v. Graham,* 74 N. C., 649; *S. v. Reitz,* 83 N. C., 636; *S. v. Daniels,* 134 N. C., 655; *S. v. Hunter,* 143 N. C., 610, and numerous citations to the last in the Anno Ed., among others, *S. v. English,* 164 N. C., 506; *S. v. Andrews,* 166 N. C., 351. Here this evidence was corroborated by the confessions.

The prisoners moved to strike out the following evidence, which had been admitted without exception, by the officer Duncan: "I followed them to Georgia and caught them at Armour, Ga. In searching them I found a new $10 bill on Lowry and a new $10 bill on Poston, both of the King's Mountain Bank, and a $1 bill and a pocketbook on Poston, and after searching the house where they had been staying I found $60 more of new money." The court refused this motion, because, although evidence of the confessions had been excluded because there were threats of lynching, it was competent to show the above facts. The prisoners then moved to strike out the following evidence which had been elicited by a question from the court and to which there had been no ob-
(735) jection at the time: "This was at the house where they had hid it. Here is some that was on them. These (other) are two old $10 bills that I found at John Best's."

This evidence having been admitted without objection, except as above stated, it was discretionary with the judge whether he would strike out the testimony on the new ground urged, after it had been admitted. *S. v. Lane,* 166 N. C., 333; *S. v. Efler,* 85 N. C., 585. The prisoners' counsel in the oral argument here, though not in the brief, on the motion to strike out evidence, laid stress on the expression that the money had been found "at the house where they had hid it." If this had been objected to at the time the court would doubtless have stricken it out and the witness could have modified the testimony by saying that in consequence of what the prisoners had said he had found the money under the mattress at the house where "it had been hidden." Certainly it

cannot be deemed that the difference was of such vital importance that the modification of the answer would have changed the verdict in this case. Besides, the prisoner did not object to it on this ground in apt time.

Upon consideration of the whole case, we do not find that the prisoners have been prejudiced by the rulings of the court in any respect.

No error.

Cited: S. v. Merrick, 172 N. C. 872 (6f); *Lee v. Thornton,* 174 N. C. 289 (4f); *S. v. Davis,* 175 N. C. 727 (4f); *S. v. Spencer,* 176 N. C. 713 (5f); *S. v. Newsome,* 195 N. C. 557 (2f); *S. v. McLeod,* 198 N. C. 652 (5f); *S. v. Moore,* 210 N. C. 692 (2f); *S. v. Mays,* 225 N. C. 489 (5f); *S. v. Walker,* 226 N. C. 461 (5f); *S. v. Ragland,* 227 N. C. 163 (5f).

STATE v. J. C. WILKES.

(Filed 1 December, 1915.)

1. Criminal Law—Health—Nuisance—Interpretation of Statutes.

Evidence that defendant's stable, located within 4 feet of a family dwelling-house, was in so foul and filthy condition as to prevent, at times, a member of the family from eating his meals, and that the owner of the stable had been notified by the health officer and failed to abate the nuisance, is sufficient for conviction under the provisions of section 12, chapter 62, Public Laws 1911, and for the imposition of the fine prescribed by section 13 thereof.

2. Trials—Evidence—Motion to Strike Out—Appeal and Error—Objections and Exceptions.

Where testimony has been given on the trial of an action without objection, it is within the discretion of the trial judge to strike it out on motion thereafter made.

3. Criminal Law—Health—Stables—Nuisance—Evidence—Other Stables.

Where the owner of a stable has been indicted for maintaining a nuisance dangerous to health in the opinion of the county superintendent, chapter 62, Public Laws 1911, testimony as to the condition of other stables in the same locality is irrelevant and properly excluded upon the trial.

4. Instructions—Oral Requests—Appeal and Error.

Prayers for special instruction are required to be in writing, and the failure to give oral requests therefor will not be considered on appeal.

APPEAL by defendant from *Devin, J.,* at April Term, 1915, of (736) RICHMOND.

Criminal action. The defendant was convicted, and from the sentence of the court appeals.

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

W. R. Jones for defendant.

BROWN, J. The defendant was prosecuted on a warrant issued from the county court of Richmond County, charging him with maintaining a nuisance in keeping a filthy stable.

Chapter 62, Public Laws 1911, in section 12, provides, in part: "Whenever and wherever a nuisance shall exist which in the opinion of the county superintendent of health is dangerous to the public health it shall be his duty to notify in writing the parties, responsible for its continuance, of the character of the nuisance and the means of abating it. Upon this notification the parties shall proceed to abate the nuisance"; and in section 13 provides: "If any person, firm, corporation, or municipality responsible for the existence and continuance of a nuisance, after being duly notified in writing by the county superintendent of health to abate said nuisance, shall fail to abate the same for twenty-four hours after such notice prescribed, he shall be guilty of a misdemeanor, and shall be fined $2 a day as long as said nuisance remains."

There is abundant evidence which justified the conviction of the defendant for maintaining a nuisance. The facts are, according to the testimony offered by the State, that his stable was situate within 4 feet of a dwelling-house within which a family lived; that it was in a foul and filthy condition to such an extent that one witness testified, who resided in the house, that at some times he could not eat his meals. The evidence shows that he was notified by the health officer, Dr. Everett, and that he failed to abate the nuisance as required by the statute. The motion of the defendant to strike out the testimony of Dr. Everett as incompetent was properly overruled. Assuming that it was incompetent, it had been admitted without objection, and it was within the sound discretion of the trial judge whether he would strike it out at that stage of the case. *S. v. Lane,* 166 N. C., 333; *S. v. Efler,* 85 N. C., 585.

The court very properly excluded testimony tending to prove the condition of other stables in the same locality. Such testimony tended to throw no light upon the condition of the defendant's stable. The court very properly refused the defendant's oral request for instructions. All prayers for instructions must be in writing. Section 538 of the Revisal; *S. v. Horton,* 100 N. C., 443.

No error.

Cited: S. v. Bass, 171 N. C. 783, 784 (1j).

(737)

STATE v. JOHN FAGGART.

(Filed 1 December, 1915.)

Criminal Law—Landlord and Tenant—Trespasser—Claim of Right—Reasonable Belief—Trials—Questions for Jury—Interpretation of Statutes.

For a conviction under the provisions of Revisal, sec. 3688, for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser peacefully entered under a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence in this case is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor.

APPEAL by defendant from *Lane, J.*, at August Term, 1915, of CABARRUS.

Indictment for unlawful trespass on land, under Revisal, sec. 3688.

R. A. Barringer, witness for the State, testified: "Some time during the fall of 1913 I rented a farm in No. 9 township, belonging to me and Maud Barringer, my daughter-in-law, for the two years 1914 and 1915; there were no buildings on the farm at the time I rented the place to John Faggart, and I agreed to build a house and barn on it for him, and did so. Faggart was to pay one-third of what he raised on the place as rent, and there was nothing specified as to what should be planted on any particular part of the land. He was to raise corn, cotton, and small grain, and work the land as he saw fit. He made a fairly good crop of corn and cotton in 1914, and sowed down about 8 acres in oats and wheat in the fall of 1914, while he was still in possession of and living on the land and without objection on my part. The defendant never told me he was going to leave, but I heard some talk to that effect. The first time I knew that the defendant had moved away was some time about 20 January, 1915, when I went to the house and found it empty and the key in the door. I saw defendant some time after that and told him to stay off the place, and after that the defendant Faggart forbid me to go on that part of the land which he sowed in small grain. I sent him a written notice by my son, James Barringer, forbidding him to cut the wheat and oats or to have any one else to do so for him. On 10 June, 1915, I went with several hands to this field to cut this grain, and found the defendant and his wife and Henry Bost in the field cutting and binding the grain. Faggart and myself had some words about the crop, and he went off and left his wife and Mr. Bost there. I loaded up

what he had cut and hauled it home. The defendant later cut the grain with my consent, and I took out claim and delivery for it and had
(738) it threashed, and have it now. It made about 75 bushels of wheat and oats. After the defendant John Faggart moved away I worked about 20 acres in corn and cotton on the place which Faggart had rented."

John Faggart, defendant, testified: "I rented the place from R. A. Barringer for two years, 1914 and 1915, and was to give one-third of the crops raised by me on the land as rent. There was nothing said as to what I was to raise on the land—just a general crop. Mr. Barringer agreed, at the time he rented the land, to build a house on it for me to live in and a barn which was to be shedded in front and behind, and also agreed to make a good big pasture, ample for my cattle. Mr. Barringer built the house so it did very well, but not according to contract, and I made no complaint about the house; he put up the frame of a barn and weatherboarded it up a little above the joists and left it open from there up, except a few planks nailed around above, some distance apart, and did not build any shed at all, and on that account my wagon and some of my rough feed had to stay out in the weather and was damaged; and some of my feed that was put in the barn was damaged because the barn was not finished and shedded according to contract. Barringer fenced in 4 or 5 acres, most of old pine field, for a pasture, which was eaten out in a week or two by one cow, and I was forced to get pasture from other parties for my cattle, because Barringer did not make a pasture as he contracted to do. I made a fairly good crop of corn and cotton during 1914 and I sowed about 8 acres of wheat and oats in the fall. I expected to stay on and work the place the second year, and would have done so if Mr. Barringer had complied with his contract and built the barn and pasture as he had agreed to do. I told James Barringer, R. A. Barringer's son and Maud Barringer's husband, some time in December, 1914, before I rented another place, to tell his father, if they didn't build a shed to the barn, as they had promised, that I was going to leave, for I could not stay there unless I had some way to take care of my stuff. I moved away some time about 20 January, 1915, and had not been back until about the 10th of June, when I went back with hands to harvest the crop, etc. I had already forbidden Barringer to go on the land. I had no intention of abandoning my crop of wheat and oats, and had not done so. I had sowed the crop and had done all to it that had been done, and when it got ripe I thought that I had a right to harvest the crop and get my part of it, and went there for that purpose. I moved away and didn't cultivate the land the second year, because Mr. Barringer did not do what he contracted to do about the barn and pasture, and I could not afford to stay

there and have no pasture and no way or place to take care of my crop after I made it. I rented a place from Mr. Crawford Ross and moved there 20 January, 1915, and worked a crop of cotton and corn this year on Mr. Ross's place."

Mrs. John Faggart testified: "I am the wife of the defendant, (739) and was present when the contract was made. Mr. Barringer agreed to build the house, to build and shed the barn, and to make a large pasture, enough for the cattle. We had two cows, and the pasture he made was not enough for one but a few weeks, and we had to get pasture from our neighbors most of the summer. We lost some feed because Mr. Barringer never built the barn as he agreed to do. We left the place because Mr. Barringer did not fulfill his contract, and we could not afford to stay there another year without pasture for our cows and a place to house our feed. It was too hard on me to take our cows a half mile away to somebody else's pasture, and, besides, he had agreed to furnish us plenty of pasture and didn't do it, and we did not want to stay unless he did."

James Barringer, witness for the State, testified: "I am the son of R. A. Barringer and the husband of Maud Barringer, who owned this land. I was not present when the contract was made, nor when my father and others went to the field to cut the grain. When I got to the field where they were, John Faggart was not there, but his wife and Mr. Bost were there. I delivered the notice, or a similar one, to the defendant." Notice forbidding the defendant to go on the land to cut the grain, or to have any one do so, dated prior to 10 June, 1915, with R. A. Barringer's name signed to it, was offered in evidence.

The court instructed the jury that if they believed the defendant's own evidence, to return a verdict of guilty, he being guilty on his own statement. There was a verdict of guilty, and from the judgment thereon defendant appealed.

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

H. S. Williams for defendant.

WALKER, J., after stating the case: The statute under which this indictment was drawn has been the subject of much consideration by this Court. It was thought, until the decision in *S. v. Bryson,* 81 N. C., 505, that the meaning of the Legislature was quite well understood, and that the law was enacted to keep off intruders or interlopers, and not to punish those who, in good faith and under claim of right, had entered upon land. It was held very soon after the adoption of the statute that where one, having no legal right, entered upon land under

a claim of such right, and in good faith, the act of entry was not within the mischief of the statute, though within its words. *S. v. Hanks,* 66 N. C., 613; *S. v. Roseman, ibid.,* 634; *S. v. Ellen,* 68 N. C., 281; *S. v. Hause,* 71 N. C., 518; *S. v. Crosset,* 81 N. C., 579. In those cases we approved what was held in *Dotson v. State,* 6 Coldwell (740) (Tenn.), p. 545, in regard to a statute similarly worded: "If one commit a trespass upon the land of another, his good faith or ignorance of the true right or title will not exonerate him from civil responsibility for the act. But when the statute affixed to such a trespass the consequence of a criminal offense, we will not presume that the Legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction." And again, at p. 548: "We think that to authorize a prosecution of this nature there must be something more than a mere technical trespass upon the land. The trespass must be committed willfully and knowingly." In *S. v. Bryson,* 81 N. C., 595, the Court held that the defendant must have acted *bona fide,* under a claim of right to enter, but that he must also have had reasonable ground for his claim and his belief that he had the right. The Court said: "If a party be indicted for a trespass on land, and in the proof there be no evidence of a claim of title, or of such facts and circumstances upon which he could reasonably and *bona fide* believe he had a right to do what he did, the court will not submit an inquiry to the jury as to a mere abstraction; and therefore we hold there was no error in the refusal to charge the jury as requested." It will be seen by careful attention to the facts of that case that there the defendant had not the semblance of a right to enter upon the land, and no reasonable man could have thought that such a right existed. He once had a bare license to cross the land along a path or way, but this privilege, which he must have known was revocable at the will of the owner, was withdrawn by him, and the entry was thereafter made. This was a clear case of willful entry, and it could not have been *bona fide* under a claim of right; and so are the cases which have followed that decision. The facts in them showed, on their face, that there was not room for even a pretense of right, nor any ground upon which to base an honest claim. The *Bryson case* is reviewed by the Court in *S. v. Whitener,* 93 N. C., 590, *Justice Ashe* delivering the opinion with his accustomed clearness and precision of statement, and it is distinguished from the cases which preceded it by reason of its special facts, and the principle of the decision, thus limited, is not applicable to this case. In *S. v. Wells,* 142 N. C., 590, *Justice Hoke,* for the Court, said: " Defendant prosecuted under section 3688, Revisal 1905, which makes it a misdemeanor for one to enter on the land of another after

being forbidden, cannot be convicted if he enters having right or under a *bona fide* claim of right. *S. v. Crosset,* 81 N. C., 579; *S. v. Whitener,* 93 N. C., 590; *S. v. Winslow,* 95 N. C., 649. True, we have held in several well considered decisions that when the State proves there has been an entry on another's land after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question (741) of *bona fides* of such claim the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. *S. v. Glenn,* 118 N. C., 1194; *S. v. Durham,* 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then, in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted. The judge finds, and we agree with him, that the defendant entered without right, but the question of whether he entered upon a *bona fide* claim of right does not appear in the facts, and has never been determined. The defendant's guilt, therefore, has not been established, and the judgment against him must be set aside."

If the party who enters upon the land has a legal right to do so, there could be no question of his innocence; it is only where he has no such right that this statute applies. If he has the legal right, and enters forcibly and violently or with a strong hand, in a way tending to cause a breach of the peace, he would be guilty of forcible trespass, or forcible entry, as the case may be, at common law, and also be liable to a civil action for damages; but when he enters without force, while he may be liable civilly for damages because of the wrong committed by him, as where he did not have the legal right to enter, he is not criminally liable under the statute if his entry was made under a claim of title, founded upon a reasonable belief that he had the right to go upon the land. *S. v. Whitener, supra.* In this case it appears that the parties, prosecutor and defendant, were disputing as to the right of entry, the former contending that defendant had fully abandoned the premises, including the wheat field, and the defendant insisting that he had not done so, and that he vacated the land temporarily because the prosecutor had not complied with his contract, and that by reason thereof the condition of the premises was such that he could not stay there. He notified the prosecutor that he must not take possession of the wheat field or cut the wheat, and he was forbidden by the landlord to come upon the land.

There is some evidence from which a jury might infer that defendant intended to return and cut the wheat. He lived on the land the first year and made a good crop, and would have remained on that part of it

where the houses were had the prosecutor made it tenantable, as he had promised to do. He was bound to leave and seek another house in order to get proper shelter for his family and his stock, and this was caused by the landlord's wrongful act.

When the defendant first cut the wheat the prosecutor hauled it away, but finally consented that defendant might continue the cutting, and then he appropriated all the wheat.

(742) We do not think this case is within the principle of *S. v. Bryson,* 81 N. C., 595, and the cases which have followed it, but that it is governed by the rule, as applied in the other cases, where the question of the defendant's guilt was held to be one for the jury to decide, under proper instructions of the court. We do not think it was so unreasonable for the defendant to suppose that, under the circumstances, he had the right to go upon the land, when the crop matured, and cut the wheat, especially as the prosecutor had not complied with his contract, and compelled him to obtain shelter elsewhere. The facts might reasonably impress him with the belief, unlearned in the law as he was, that he had the right to gather what he sowed. We do not hold that he had a legal right to return to the land and cut the wheat. It is not necessary to do so, but we do not think the facts justified the peremptory instruction that defendant was guilty on his own statement, and the question of good faith and reasonable claim must be submitted to the jury. We consider the case quite as strong for defendant as some of those decided by this Court, and above cited, where a similar conclusion was reached.

The original fault was with the prosecutor, who, by his failure to perform the contract, made that part of the land where defendant lived untenantable and compelled him to seek another home, though there is evidence that he did not intend to abandon his right to return and cut the wheat and oats. Being a layman, he might reasonably have thought that he had properly reserved this right owing to the prosecutor's conduct in compelling him to leave, however the law may be.

New trial.

Cited: Kirkpatrick v. Crutchfield, 178 N. C. 350 (g).

STATE v. MALCOLM ALIAS MAKE SMITH.

(Filed 8 December, 1915.)

1. Homicide—Nol. Pros. With Leave—Capias.

Where a *nol. pros.* with leave is entered for one indicted of a homicide, who is thereupon and before the trial of the action discharged from the prison without being required to give bond or recognizance, the accused may thereafter be arrested under the capias issued on the bill of indictment; and the solicitor may elect to try him for murder in the second degree, instead of the greater offense charged.

2. Criminal Law—Pleas—Former Jeopardy—Not Guilty.

The plea of not guilty of the criminal offense charged and of former jeopardy may be relied on as a defense in the same action.

3. Homicide—Nol. Pros. With Leave—Former Jeopardy—Impaneling Jury—Issues.

Where a *nol. pros.* with leave is entered as to one charged with homicide, to which he has pleaded not guilty, an he is again arrested upon a capias and held to trial for the offense charged, and it appears that no jury has theretofore been impaneled to try him, his plea of former acquittal is untenable, for no jeopardy attaches until a jury has been impaneled, and under such circumstances there is nothing issuable for the jury.

4. Homicide—Pleas—Former Jeopardy—Burden of Proof.

The burden of proof is on the defendant accused of homicide to show former acquittal when this is relied on by him as a defense.

5. Homicide—Evidence—Testimony of One of Two Accused.

Where two persons are accused of the same homicide, one confesses and a *nol. pros.* with leave is entered as to the other, who is afterwards brought to trial, the unsupported evidence of the one who had confessed is sufficient to sustain a judgment of conviction of the other.

6. Same—Instructions—Party Interested—Caution to the Jury.

Where one of two persons accused of a homicide has confessed and testifies against the other at a subsequent trial, while serving his sentence, objection to the charge of the court is untenable that he failed to caution the jury as to the credence to be given testimony of this character, when it appears from his charge that he instructed them particularly that in passing on the evidence of that witness they must consider the interest he had in the matter of getting a pardon or a reduction of his sentence in case a conviction was had.

APPEAL by defendant from *Lane, J.*, at July Term, 1915, of (743) MONTGOMERY.

Indictment for murder. The defendant was convicted of murder in the second degree and sentenced to the penitentiary, and from the judgment appeals.

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

W. A. Cochran for defendant.

BROWN, J. The defendant Malcolm Smith and one Charles Smith were indicted on separate bills of indictment, and also on a joint bill, at January Term, 1907, for the murder of one Milton Bunnell. This defendant, at July Term, 1915, was found guilty of murder in the second degree, and sentenced to a term of eighteen years in the State Prison.

At January Term, 1907, this defendant was arraigned, and entered a plea of not guilty. At that term of court his codefendant, Charles Smith, was placed on trial and found guilty of murder in the second degree for the killing of Milton Bunnell, and was sentenced to a term of thirty years in the State Prison. At the following September term a *nol. pros.*, with leave, was entered as to the defendant Malcolm Smith, who was then discharged from prison without being required to give any bond or recognizance.

In January, 1915, this defendant was arrested under capias issued on the bill of indictment returned at January Term, 1907, and at
(744) July Term, 1915, was placed on trial charged with the murder of Milton Bunnell. The solicitor, as he had a right to do, elected to try him for murder in the second degree.

The testimony of Charles Smith, who had been previously convicted, was offered by the State, and this testimony was corroborated by the testimony of Frank Page. It is sufficient to say that this testimony tended to prove that this defendant, Malcolm Smith, instigated his son, Charles Smith, to commit the murder.

At the commencement of the trial, and in apt time, counsel for defendant offered a plea in abatement, and moved the court to dismiss the prosecution for the reason that the defendant had formerly been placed in jeopardy upon the bills for indictment returned by the grand jury at January Term, 1907. This motion was overruled by the court.

It appears from the record that at January Term, 1907, this defendant was arraigned and pleaded not guilty, and that at the following September term a *nol. pros.*, with leave, was entered and the defendant discharged without bail. Charles Smith was placed on trial and convicted at January Term, 1907, but the record nowhere shows that any proceedings were taken or trial had as to this defendant after his plea of not guilty until the September Term, 1907, when the *nol. pros.*, with leave, was entered. It nowhere appears that a jury was at any time sworn and impaneled to try him.

The defendant excepts because the trial judge overruled his plea in abatement and did not submit an issue to the jury upon the plea of former jeopardy. It is true that this plea may be tried in connection with the plea of not guilty. *S. v. Elsworth,* 131 N. C., 773. The defendant, however, tendered no such issue, and did not ask that any such issue be submitted to the jury, or tender any evidence in support of it. The burden rests upon the defendant to sustain his plea of former acquittal. *S. v. White,* 146 N. C., 608.

It would have been futile, however, to have submitted any such issue, as the record shows conclusively that this defendant was never in jeopardy. The great weight of authority is to the effect that jeopardy does not arise until after the jury is duly impaneled and sworn to make due deliverance in the case, and that when this is done jeopardy attaches. Wharton's Criminal Law (11 Ed.), vol. 1, 517; 12 Cyc., 261.

There was no acquittal, for a *nol. pros.* in criminal proceedings does not amount to an acquittal, and the defendant may be arrested again upon the same bill and put to trial. *S. v. Thornton,* 35 N. C., 256; 12 Cyc., 268.

The contention of the defendant that the testimony of Charles Smith was not sufficiently corroborated cannot be sustained. It is well settled that in this State the uncorroborated evidence of an accomplice is sufficient to convict, if believed by the jury. In this case the evidence of Charles Smith was corroborated to a certain extent by the decla- (745) rations he made to Frank Page.

The objection of the defendant that the court failed to caution the jury as to the interest the witness Charles Smith had in the matter is not sustained by a reading of the charge, for the court particularly instructed the jury that in passing on the evidence of that witness they must take into consideration the interest he had in the matter of getting a pardon or a reduction of his sentence in the event he caused the conviction of his father. We think his Honor's charge in this respect was all that defendant had a right to expect.

Upon a review of the whole record, we find

No error.

Cited: S. v. King, 195 N. C. 623 (4f); *S. v. Norris,* 206 N. C. 195 (3f); *S. v. Davis,* 223 N. C. 57 (21).

STATE v. L. E. STEPHENS.

(Filed 8 December, 1915.)

1. Indictment—Counts—Duplicity—Courts—Criminal Law.

An indictment may charge several offenses arising out of the same transaction, and it is discretionary with the trial judge to consolidate two bills against the same accused and treat them as separate counts of the same bill; and though the indictment may be bad for duplicity, the error will be cured by a *nol. pros.* as to all but one offense, or by a verdict.

2. Criminal Law—Attempt to Commit Arson—Felony—Statutes.

Revisal, sec. 3338, changes the common-law offense of an attempt to commit arson from a misdemeanor into a felony.

3. Indictment—Several Counts—Election.

Where there is more than one count under an indictment in a criminal matter relating to the same transaction, the State is not required to elect before the close of the evidence, and whether an election will be ordered rests within the discretion of the trial judge.

4. Criminal Law—Accessory—Principal Not Tried.

An accessory before the fact may be put on trial irrespective whether the principal shall have been put on trial or not.

5. Indictment—Attempt to Commit Arson—Defects — Motions — Supreme Court—Specific Averment—Separation—Procedure.

The defendant may move in the Supreme Court in arrest of judgment on an indictment which is fatally defective; but on the charge of an attempt to commit arson, the means by which the offense was committed need not to be specifically averred, and the motion in arrest will be refused when sufficient matter appears upon which to rest the judgment (Revisal, sec. 3254), the proper course being to request the trial judge, in his discretion, to order a bill of particulars, under the provisions of Revisal, sec. 3244.

6. Indictment—Less Offense—Conviction—Accessory—Attempt to Commit Arson.

A person charged with arson may be convicted of the less offense of an attempt to commit arson (Revisal, sec. 3244); but the question does not arise in this case whether he may be charged as an accessory before the fact and convicted of an attempt, the judge having charged the jury that they could not convict of the first offense.

(746) APPEAL by defendant from *Harding, J.*, at February Term, 1915, of CATAWBA.

Attorney-General Bickett, Assistant Attorney-General Calvert, and W. A. Self for the State.

Walter C. Feimster, Avery & Erwin, and Councill & Yount for defendant.

CLARK, C. J. The defendant was tried under two bills treated as counts in the same indictment. In the first bill he was indicted jointly with one Leary Lowman, said Lowman being charged with burning the dwelling-house of M. J. Stephens, the wife of L. E. Stephens, and L. E. Stephens being charged with procuring and commanding the said Leary Lowman to commit said felony. The second indictment charged the defendant Stephens with attempting to burn the same dwelling-house.

On the first bill, when Leary Lowman was arraigned for arson the defendant L. E. Stephens, who was charged in that bill as accessory before the fact, moved and obtained a severance. Leary Lowman tendered the State submission to a verdict of guilty of an attempt to burn, under Revisal, 3336, which was accepted.

When the defendant was put upon trial on the two bills treated as separate counts he excepted to consolidation of the two bills.

The order of consolidation rested in the discretion of the court. *S. v. Toole,* 106 N. C., 736; *S. v. McNeill,* 93 N. C., 552; *S. v. Reel,* 80 N. C., 442.

Two indictments for the same offense may be treated as separate counts of the same bill. *S. v. R. R.,* 152 N. C., 785; *S. v. R. R.,* 125 N. C., 666; *S. v. Perry,* 122 N. C., 1018; *S. v. Lee,* 114 N. C., 885.

The defendant was here charged as accessory before the fact in procuring Lowman to burn the house of M. J. Stephens, and in the second count with an attempt to burn the same house. An indictment may charge several offenses arising out of the same transaction. *S. v. Burnett,* 142 N. C., 577; *S. v. Howard,* 129 N. C., 584.

At common law an attempt to commit a felony was a misdemeanor. *S. v. Jordan,* 75 N. C., 27; *S. v. Boyden,* 35 N. C., 505. But now, under Revisal, 3336, an attempt to commit arson is made a felony.

An election is not required, where there is more than one count relating to the same transaction, until the close of the evidence. In *S. v. Parish,* 104 N. C., 687, the Court said: "It rests in the sound discretion of the trial judge to determine whether he will compel an (747) election at all, and, if so, at what stage of the trial." To same effect, 1 Bishop New Cr. Proc. (2 Ed.), sec. 454 *et seq.*

In *S. v. Burnett,* 142 N. C., 577, it was held that though an indictment charging two separate and distinct offenses in the same count was bad for duplicity, the error was cured by a *nol. pros.* as to all but one charge, or by a verdict.

The court instructed the jury that they could not convict the defendant on the first count as accessory before the fact to arson. This was doubtless because he thought there was no evidence to support the charge, for under Revisal, 3287 and 3288, an accessory before the fact may be

put on trial irrespective whether the principal shall have been put on trial or not.

The defendant was convicted on the second count for an attempt to commit arson. He moves in this Court in arrest of judgment upon the ground that the bill does not charge an overt act. This motion can be made for the first time in this Court, like the similar motion that a complaint does not state a cause of action or that the Court does not have jurisdiction. Rule 27, 164 N. C., 548; *S. v. Caldwell,* 112 N. C., 855, and cases cited thereto in the Anno. Ed.

There is no more reason why the methods or means resorted to in an attempt to commit arson, or any other crime, should be specifically averred than in charging the offense of arson, or murder, or any other crime. "An attempt to commit arson" or an "attempt to commit murder" conveys the same information to the defendant as if the charge was of murder or of arson, and further information could be sought by a bill of particulars in accord with our reformed procedure. We no longer charge whether a murder was committed with a knife or a pistol, nor the length and breadth and depth of a wound, and the same is true as to all other offenses. In lieu of this, we have adopted Revisal, 3244, which provides: "In all indictments, when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may in its discretion require the solicitor to furnish a bill of particulars of such matters." This statute has been repeatedly cited and applied to various offenses. See citations under that section in Pell's Revisal.

Revisal, 3254, provides that no warrant or indictment "shall be quashed nor the judgment thereon stayed by reason of any informality or refinement, if in the bill of proceeding sufficient matter appears to enable the court to proceed to judgment." The charge of an attempt to burn the house of his wife, and a conviction thereof, was certainly sufficient to enable the court to proceed to judgment. The defendant had as full information as if he had been charged with burning the house
(748) or with murder. If he desired further information, and needed it, certainly the court, on his motion, would have ordered a bill of particulars.

The defendant relies upon *S. v. Colvin,* 90 N. C., 717, which was decided over thirty years ago. By reference to that decision it will be seen that it was based upon the former practice, which required great fullness of detail in indictments, and merely instanced that the indictments as to this offense had followed the ancient precedents. That case has been mentioned three times since, *i.e.,* in the dissenting opinion in *S. v. VanDoran,* 109 N. C., 872; in *S. v. Crews,* 128 N. C., 581, in which it was not followed, the Court saying that it did not apply where

the charge was of the attempt as a crime in itself and not, as in *S. v. Colvin,* an attempt to commit another crime. It was again before the Court in *S. v. Heffner,* 129 N. C., 549, in which *S. v. Crews* was quoted with approval. Since the last of these cases, which was in 1901, the Legislature has adopted, as applicable to criminal proceedings, Revisal, 3244, above quoted, the substitution of the bill of particulars for the details formerly set out in indictments. This provision as to bill of particulars had prevailed previously as to civil proceedings, Revisal, 494, and was thus made expressly applicable to criminal cases, to which the Court had applied it in *S. v. Brady,* 107 N. C., 822.

The enactment of the bill of particulars as to criminal actions was since *S. v. Colvin,* and the above cases which cited it, and was evidently intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. In this respect "an attempt" was an anomaly in criminal proceedings, and as such was removed by Revisal, 3244.

Revisal, 3269, provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged or of an attempt to commit a less degree of the same crime." If the defendant had been charged with committing arson, he could have been convicted of an attempt to do so. It is not necessary to consider whether he could be convicted of an attempt when he was charged in the first count of being an accessory before the fact, for, however that may be, the court having instructed the jury that they could not convict on the first count, that matter is not reviewable. But on the second count, charging the attempt as a substantive offense, we think that in analogy to all other offenses and under Revisal, 3244 and 3254, the motion in arrest of judgment must be denied. The other exceptions do not require discussion.

No error.

Cited: S. v. Reid, 178 N. C., 747 (2f); *S. v. Addos,* 183 N. C. 693 (5j); *S. v. Burgess,* 186 N. C. 468 (1q); *S. v. Aldridge,* 206 N. C. 852 (1g); *S. v. Green,* 207 N. C. 372 (1g); *S. v. Wilson,* 218 N. C. 772 (5g); *S. v. Truelove* 224 N. C 148, 149 (1g).

(749)

STATE v. V. H. BLAUNTIA.

(Filed 8 December, 1915.)

1. Intoxicating Liquor—Possession of Agent—Prima Facie Case.

The possession of the agent, for the one accused of violating our prohibition law, of more than one gallon of intoxicating liquor is sufficient to make out a *prima facie* case of guilt, under the provisions of section 2, chapter 44, Public Laws 1913, carrying the issue to the jury.

2. Same—Barrels Marked Potatoes—Railroad's Possession—Guilt — Circumstantial Evidence.

It is sufficient evidence to make out a *prima facie* case of guilt of one accused of violating the prohibition law in having in his possession more than one gallon of intoxicating liquor, when it tends to show that the delivering railroad had in its possession a shipment of barrels marked potatoes addressed to the accused as consignee, but which contained several gallons of liquor covered at top and bottom with potatoes; that the next day the officers of the law found at the defendant's residence similar empty barrels, but with the marks thereon obliterated and empty bottles similar to those in the barrels they had seized; and with testimony of draymen that they had obtained from the railroad similar barrels upon a bill of lading given them by the defendant and delivered at his home, and that the defendant had signed the warehouse receipts for two barrels of potatoes.

3. Same—Prisoner Not Identified.

There being evidence in this case that the defendant, accused of violating the prohibition law, had been receiving by freight barrels marked potatoes, but containing more than one gallon of intoxicating liquor, testimony of a drayman that he had been told by a man, whom he could not identify, to haul similar barrels to the ones seized to a certain address, being that of the accused, with other corroborative evidence, is held relevant in establishing a *prima facie* case of defendant's guilt in having more than one gallon of liquor on hand, both on the principal issue of guilt and on the question whether the liquor seized in the railroad's possession, and purporting to be consigned to the defendant, was held by the railroad as defendant's agent and with his consent and procurement.

APPEAL by defendant from *Lyon, J.*, at June Term, 1915, of GUILFORD.

Indictment for violation of section 2 of the Search and Seizure Law and for unlawfully having spirituous liquor in possession for purposes of sale, tried on appeal from municipal court. Defendant was convicted and, from judgment on the verdict, appealed to the Supreme Court.

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

John A. Barringer for defendant.

HOKE, J. Chapter 44, Public Laws 1913, section 2, makes it unlawful for any person, etc., other than druggists and medical depositories, duly licensed thereto, "to have in possession for purposes of sale any spirituous, vinous, or malt liquors," and, among other things, makes the having in one's possession more than one gallon of liquor at (750) one time, whether in one or more places, *prima facie* evidence of a violation of the section.

The statute has been directly upheld as a valid enactment, *S. v. R. R.*, 149 N. C., 508; *S. v. Wilkerson,* 164 N. C., 431; and it has been also held that where it is established that the amount of spirituous liquors specified is in the control and possession of defendant's agent, such possession shall be deemed sufficient to make out a *prima facie* case of guilt within the meaning of the law. It is chiefly urged for error by defendant that there is in this case no valid or sufficient evidence that he had possession of one or more gallons of spirituous liquors at one and the same time so as to make out a *prima facie* case, and, this being true, the forbidden offense has not been established; but we do not so interpret the record. On the trial there were facts in evidence tending to show that defendant worked in a barber shop in Greensboro, and that on or about 18 May officers of the police seized three barrels, appearing to be barrels of potatoes, at the railroad station, purporting to be consigned to V. H. Blauntia, marked "Michigan Seed Potatoes"; another mark on the barrel was "From Walenstein Brewery Company, Richmond, Va."; that, on examination, it was found that in the barrel there were a few potatoes at the bottom and top and between these were forty pints of whiskey in bottles; that on the 19th of May the officers went to the home of defendant, 121 Thomas Street, and found there some empty barrels similar to those found at the station except that the marks on the barrels had been erased or obliterated, and they also found there a lot of empty bottles similar to the kind found full in the barrels that were seized. It was further shown that, just prior to this seizure, two other barrels of potatoes had been receipted for by Cyrus Caldwell, a drayman. Charles Johnston, a drayman, testified that he hauled a barrel of potatoes for defendant, similar in kind and appearance to those seized and now in the possession of the police, and, by his direction, delivered it to his house, 121 Thomas Street; that he did not notice the address on the barrel, but he got the same from the station agent on presenting the bill of lading given him by the defendant.

Cyrus Caldwell, another drayman, testified that, at the request of some man he could not possibly identify, he, about six or eight days before the trial in the municipal court, procured from the station two barrels, apparently of potatoes, on presenting the bills of lading given him by the man, and, by his direction, he took them to the house, 121

Thomas Street. The warehouse receipts for two barrels of potatoes were identified as having been signed for by this witness. The bill showed shipment from Richmond, Va., and addressed to Mrs. V. H. Blauntia.

If the jury should find that the three barrels containing the whiskey, addressed to V. H. Blauntia, were in the care and custody of the (751) railroad by his consent and procurement, this would be considered his possession within the meaning of the statute, *S. v. Lee, supra; Hunter v. Randolph,* 128 N. C., 91; *Gwyn v. R. R.,* 85 N. C., 429, and a *prima facie* case would be established of itself, carrying the issue to the jury; and this and the entire testimony are, in our opinion, amply sufficient to justify defendant's conviction of the charge made, "that he had in his possession spirituous liquors for the purpose of sale."

It was also urged for defendant that the court committed error in refusing to strike out the testimony of the witness Cyrus Caldwell, for the reason chiefly that he failed to identify defendant as the man who gave him the two bills of lading for which he receipted; but while he failed to identify the man, he spoke with certainty of the place to which the man directed him to take the barrels, and this, in connection with the fact that defendant had given similar directions about another barrel to the witness Johnston, and that barrels and also empty bottles, both resembling the barrels and the bottles of whiskey seized, were found at this house, No. 121 Thomas Street, the home of defendant, presented a combination of facts that rendered the statement of Caldwell relevant, both on the principal issue of guilt and on the question whether the whiskey seized and purporting to be consigned to defendant was held by the railroad company as defendant's agent and with his consent and procurement.

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

No error.

Cited: S. v. Baldwin, 178 N. C. 697 (2g); *Colt v. Kimball,* 190 N. C. 173 (3g).

STATE v. FRANK CLINE.

(Filed 8 December, 1915.)

1. Criminal Law—Seduction—Breach of Promise—Requisites.

For conviction for seduction under promise of marriage it is necessary to show the criminal act, submission thereto by the prosecutrix under the promise, and that she was innocent and virtuous.

2. Criminal Law—Seduction—Prosecutrix's Evidence—Corroboration.

Upon trial for seduction under promise of marriage, evidence tending to show that the defendant told the witness that he was in trouble with regard to the prosecutrix, and asked his advice, and upon being asked if he had promised the prosecutrix to marry her, replied "that they had talked together of getting married," is sufficiently corroborative of the direct testimony of the prosecutrix in that respect to make her evidence competent.

3. Criminal Law—Seduction—Virtuous Woman—Evidence.

To convict of the offense of seduction under breach of promise of marriage, it is required that the innocence or virtue of the woman must be shown, or that she had not theretofore had sexual relation with another; and though the general character of the prosecutrix for virtue is highly corroborative, she alone is capable of giving direct evidence on the subject.

APPEAL by defendant from *Shaw, J.*, at August Term, 1915, of (752) BURKE.

Indictment for seduction under promise of marriage. The defendant was convicted and sentenced to the penitentiary, and from the judgment rendered, appeals to this Court.

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

Spainhour & Mull for defendant.

BROWN, J. The defendant is indicted under section 3354 of the Revisal, which provides that if any man shall seduce an innocent and virtuous woman under a promise of marriage he shall be guilty of a felony. It is provided that the unsupported testimony of the woman shall not be sufficient to convict. Under this statute there are three essentials to a conviction: First, the criminal act itself; second, that the woman was induced to submit because of a promise of marriage; and, third, that the woman herself was an innocent and virtuous woman. *S. v. Pace,* 159 N. C., 462.

The first of these essentials is testified to by the prosecutrix as well as admitted by the defendant. There is evidence tending to prove that the prosecutrix submitted to the wishes of the defendant by reason of a promise of marriage. The statute says that the unsupported testimony of the woman shall not be sufficient to convict. There is evidence tending to corroborate and support her testimony as to the promise of marriage.

Burt Williams, a witness for the State, testifies that the defendant told him he was in trouble and wanted some advice. "I asked him if he had

promised to marry Miss Addie. He never answered whether he had or not, but hesitated and said that they had talked of getting married." This evidence, we think, was sufficient to go to the jury as supporting evidence, but we are of opinion that there is not sufficient evidence to convict upon the third essential.

Sexual intercourse is not an indictable offense under this statute, nor is seduction itself a criminal offense, but it is the seduction of an innocent and virtuous woman under the promise of marriage that constitutes a criminal offense. As has been said: "The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage."

An innocent woman, within the meaning of this statute, has been defined to be "one who had never had actual illicit intercourse with a man." *S. v. Horton*, 100 N. C., 447.

There is evidence in this case tending to prove in a general way that the prosecutrix is a woman of good character, and that is strengthening evidence to the testimony of any witness, but there is no substantive evidence in this record that the prosecutrix is an innocent woman. She fails entirely to testify that she has never had illicit sexual intercourse, a fact necessarily known to herself better than to any one else.

(753)

For these reasons we think the evidence fails to come up to the standard required by law.

New trial.

Cited: S. v. Moody, 172 N. C. 968 (1g, 3b); *S. v. Fulcher*, 176 N. C. 726 (3b); *S. v. Johnson*, 182 N. C. 887 (1g); *Hardin v. Davis*, 183 N. C. 47 (1p); *S. v. Doss*, 188 N. C. 215 (1g); *S. v. Shatley*, 201 N. C. 84 (1g).

STATE v. CHARLES JONES ET AL.

(Filed 15 December, 1915.)

Railroads—Statute—Charter Provisions—Entry Before Condemnation—Rightful Entry—Forcible Trespass.

A provision in the charter of a railroad company that it shall not be required to institute proceedings for the condemnation of lands prior to the time of entering thereon for the purpose of constructing its road is valid; and where the exercise of this power does not come within the exceptions of Revisal, sec. 2587, as to invading a dwelling-house, yard, etc., the entry upon the land is rightful under the terms of the statute, and

does not constitute forcible trespass, though the way is fenced off by the owner, who forbids the entrance with loaded guns.

WALKER, J., dissenting.

APPEAL by defendants from *Harding, J.*, at March Term, 1915, of WILKES.

This is an indictment for forcible trespass. The defendants, employees of a railroad company, were engaged in grading the right of way across the lands of Jesse Dula, brother of the prosecuting witness. They owned adjoining tracts of land on the southwest side of Elk Creek. The prosecuting witness also owned land on the other side of the creek, where he lived. Before the survey for the railroad was made he executed a deed for a right of way across his land, with the stipulation that it should not run between his dwelling and Elk Creek. In locating the road the engineers found it to be difficult to avoid locating the track between his dwelling and Elk Creek. They therefore proposed to locate it there with a view of paying him for the right of way, since that location was not permitted under his deed. He obtained a restraining order against the construction of the road between his dwelling and the creek. This delayed the construction of the road, and the company abandoned that route and obtained a right of way from other parties on the south side of the creek, so as to again reach its line where it had been located beyond the prosecutor's land, on the north side. In doing this, the company had to run over 80 to 100 feet of his land on the south side of the creek. The prosecutor obtained a restraining order to prevent this, which was dismissed by the judge 26 August, 1914, about a (754) month before the trespass alleged. When the grading had gotten within 50 or 100 feet of the prosecutor's line at that point he stretched a wire across the right of way, on 23 September, from a willow to a stake. This being torn down by some one, on the morning of 25 September, 1914, the day of the alleged tresspass, he went to the location armed with two double-barreled shotguns and supplied with two boxes of shells. He again put up the barbed wire across the right of way, stretching it from the willow on the bank of the creek to a stake 45 feet distant. This fence inclosed nothing and was intended to inclose nothing.

The defendants, railroad employees, in going to their work on Jesse Dula's land had been in the habit of crossing the creek at the ford and then going up the creek bank without getting on the prosecutor's land. When the defendant railroad hands came to their work the morning in question the prosecutor was there with his armament and forbade them going on with the work, saying that he would kill the first man that attempted it. Walter Jones, one of the defendants, happened to come along the public road on some errand, and, seeing that trouble was

likely, asked the other defendants to wait until he could get an officer to help him preserve the peace. When the officer came the foreman of the [workers] and one of the hands proceeded to cut the wire and fill up a ditch which the prosecutor had cut as an obstruction. He forbade them to do this, and attempted to shoot, but was prevented by the officer.

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

Finley & Hendren for the defendants.

CLARK, C. J. Upon the evidence the court should have instructed the jury to return a verdict of not guilty.

The defendants were employees grading the right of way of the Watauga and Yadkin River Railroad Company, whose charter gave it the right to go upon land and construct its road before instituting condemnation proceedings. Its amended charter giving the above powers, is chapter 11, Pr. Laws 1913, which amended the previous charter, chapter 411, Pr. Laws 1905, and contains this provision: "And said railroad company shall not be required to institute proceedings for the condemnation of lands prior to the time of entering upon the lands of any person for the purpose of constructing its line of railroad." This provision of its charter has been recently upheld in *R. R. v. Ferguson,* 169 N. C., 70.

The court was possibly misled by *S. v. Davenport,* 156 N. C., 596,
(755) where it was held that the entry into the possession of another by force, no matter how that possession was obtained, for what purpose, or how long exercised, would make the defendants guilty. In that case the alleged trespass was on behalf of a lumber company which did not possess the right of eminent domain. But here the defendants have entered under the right of eminent domain, and the company was entitled to possession, having surveyed and located the right of way and entered thereupon for the construction of the road.

The prosecutor had been successful by his restraining order in preventing the locating of the road on his side of the creek between his dwelling and the stream. The railroad company had then changed its location of the right of way to the other side of the creek, and the restraining order against the company from using that location, which the prosecutor had sued out, had been dissolved on 26 August by the judge, who had thus upheld the legality of possession of the right of way by the railroad company. The resort of the prosecutor thereafter to his "shotgun injunction," with the accompaniment of barbed-wire entanglements and trench, could not make the possession of the railroad company

illegal nor reverse the action of the judge in dissolving the restraining order.

Upon the facts in this case there was a forcible trespass, but it was not by these defendants. The prosecutor was the party liable to indictment. The right of eminent domain is in the State, and was conferred by it upon this railroad company rightfully, as the construction of a railroad is "for a public purpose." This location did not come under any of the exceptions in the statute, Revisal, 2587. It did not invade any dwelling-house, yard, kitchen, garden, or burial ground.

In refusing the motion to nonsuit there was

Error.

WALKER, J., dissenting: I cannot agree to the ruling in this case, believing it to be contrary to every case heretofore decided by this Court on the law of forcible trespass. John T. Dula was in possession of the land he claimed as his own, not being within the railroad's right of way. Whether he had title or legal claim to the land made no difference. Forcible trespass is the invasion of the possession of another violently or with a strong hand; the title is never drawn in question. The possession alone is considered. "Right to property or right of possession is not material, but only the fact of possession." *S. v. Bennett,* 20 N. C., 43; *S. v. Pollock,* 26 N. C., 305; *S. v. Toliver,* 27 N. C., 452; *S. v. McCanless,* 31 N. C., 375; *S. v. Laney,* 87 N. C., 535. Demonstrative force may be by a multitude or with weapons. *S. v. Ray,* 32 N. C., 29; *S. v. Armfield,* 27 N. C., 207; *S. v. McAdden,* 71 N. C., 207; *S. v. Barefoot,* 89 N. C., 565. The force is sufficient if party in possession must yield to avoid a breach of the peace. *S. v. Pollock,* 26 N. C., 305. In this case the evidence is that John T. Dula was in pos- (756) session of the land and had fenced it to keep intruders out. He was at least there asserting his right of possession, and not one had the right, not even in the name of the sovereign power of eminent domain, to molest him or make him afraid. If this band of men was resisted in the pursuit of a lawful purpose, they should have applied to the law for redress, and not to force and high-handed violence. This has been the law from time immemorial. It was always the law, and is the only one that can prevent lawlessness and breaches of the peace. It was ordained for that purpose, to prevent men from taking the law into their own hands.

Walter Jones, the head man, applied to an officer, Hill McNeill, it is true; but he proceeded illegally and was himself a trespasser in a criminal sense. He had no warrant, and said so, having told the prosecutor that he had none; and yet he advanced upon the latter as if he were panoplied with all the authority and was acting under the majesty of the law. And he was nothing but a plain and defiant violator of its

mandate! He had no more power than any other civilian, clothed with no official authority. This makes *S. v. Yarborough,* 70 N. C., 250, directly applicable. In that case four persons with just as much, if not more, right than these defendants had, and acting under a void warrant, attempted to eject another person from land in his possession, and this Court held, and it could not have held otherwise, that they were guilty of forcible trespass or forcible entry. *S. v. Davenport,* 156 N. C., 596, is exactly in point, and is this case in principle.

I know of no law which hedges these defendants about with special privileges and immunity because they were, at the time, locating the right of way of a railroad company, or that exempts them from punishment for violating the criminal law in doing so. Neither the title to the land nor the claim of the defendants that they had a right to enter upon the land, however well founded, is in question. The offense is committed if there is actual possession by the prosecutor, or his agent, and an entry by defendant with a strong hand. *S. v. Davis,* 109 N. C., 809; *S. v. Woodward,* 119 N. C., 836; *S. v. Webster,* 121 N. C., 586; *S. v. Elks,* 125 N. C., 603; *S. v. Talbot,* 97 N. C., 494; *S. v. Lawson,* 98 N. C., 759. It is impossible to distinguish this case from *S. v. Davenport, supra,* upon any rational ground. You cannot differentiate two cases which are exactly alike—which are not only similar, but the same. The mere fact that these defendants were acting for a railroad company in delineating its right of way does not create any distinction, and certainly no difference, between the two cases, except that it makes this a stronger case, if anything, against defendants, because, inasmuch as they were acting under authority of the law, as now claimed by them, they should have been the more careful to observe and keep the law.

(757) My conclusion is that *Judge Harding* was right in submitting the case to the jury. I am further of the opinion that the defendants were guilty on their own showing, and that the judgment should be affirmed.

Cited: Lumber Co. v. Graham County, 214 N. C. 173 (g).

STATE v. LAWSON RANDALL.

(Filed 15 December, 1915.)

1. Intoxicating Liquor—Search and Seizure—Constitutional Law.

The "Search and Seizure Act" of 1913, making the possession of more than one gallon of spirituous liquor *prima facie* evidence of keeping it for sale in violation of law is constitutional and valid.

2. Intoxicating Liquor—Husband and Wife—Evidence.

Where the husband is on trial for violating the prohibition law, it is competent for a third person to testify as to the conversation between the defendant and his wife, with statements by the latter tending to fix the former with the guilt of the offense charged.

3. Appeal and Error—Exceptions After Verdict.

As to whether under the circumstances of this case it was improper or prejudicial to the defendant for the judge to have asked counsel if they desired to address the jury, *quære*. But exception thereto taken after verdict comes too late.

APPEAL by defendant from *Long, J.*, at July Term, 1915, of BUNCOMBE.

Criminal action for unlawfully selling liquor, commenced before the police court of the city of Asheville and carried by appeal of defendant to the Superior Court, where he was convicted and appealed to this Court from a judgment that he be imprisoned for eight months and work on the public roads.

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

Jones & Williams and Douglass & Douglass for defendant.

WALKER, J., after stating the case: The first exception challenges the validity of the provision of the search and seizure law, being Laws 1913, ch. 44, which makes the possession of more than one gallon of spirituous liquor *prima facie* evidence of keeping it for sale in violation of law. It is too late now to question the constitutionality of this clause of the statute. A similar provision was held to be valid in *S. v. Barrett,* 138 N. C., 630, which has been approved by this Court frequently since it was decided. As to the validity of these laws, the prohibition law of 1908, and the search and seizure law of 1913, ch. 44, we need only repeat what we said recently in *S. v. Wilkerson,* 164 N. C., 431, (758) and especially in *S. v. Russell,* 164 N. C., 482, as follows: "The prisoners counsel then fell back upon the position, which they defended with an able and learned argument, that the acts making the bare pos-

session of a prescribed quantity of liquor *prima facie* evidence that it is kept for sale, is invalid, as being in violation of the constitutional rights of the citizen, and among others, for these reasons: (*a*) It is an assumption by the Legislature of judicial power, and, therefore, an invasion by it of the province assigned to another and coördinate branch or department of the Government. (*b*) It deprives the prisoner of the common-law presumption of innocence and of the full benefit of the doctrine of reasonable doubt; and, besides, it casts upon him the burden of showing his innocence. Without admitting that the act has the effect, in law, thus imputed to it, we must decline to enter upon a discussion of the questions thus pressed upon our attention, and for the very good reason that we have squarely decided against a similar contention in *S. v. Barrett,* 138 N. C., 630, and again in *S. v. Wilkerson, ante,* 431. In both cases, after an exhaustive consideration of the matter, we have deliberately decided that a like provision of the law (in the acts relating to Union County, and in the law of general application in the State, passed at the last regular session of the General Assembly, Laws 1913, ch. 44, the "Search and Seizure" law) are constitutional and valid, both as to their criminal feature and the rule of evidence established by them. In the *Barrett case* we sustained the 'Search and Seizure' law. The legal effect of those two decisions is so plain and unmistakable that there can be no fair or reasonable doubt of it. So far as this Court is concerned, they are valid laws of the State and will be enforced strictly and rigidly, according to the intention of the Legislature in passing them."

There could be no more pronounced and emphatic utterance in favor of the validity of those laws than we have employed in that case. See, also, *S. v. McDonald,* 152 N. C., 802.

The several exceptions directed against the competency of what was said by defendant's wife to him, and his conduct on the occasion, indicating his guilt, which was admitted by the court, are clearly without any merit. The evidence was to the effect that the officers had searched the premises of the prisoner and found there two kegs containing 4½ gallons and 2 quarts of liquor and two empty kegs. McIntosh brought up four bottles of corn liquor from the basement. Defendant's house was removed from the street, which was itself obscure, "being hardly a street." Defendant rented rooms in the house to nonresidents—negro men and women from Florida. At the time of the search the prisoner said that liquor had been sent there before, but was brought there by one of his boarders named Brown. The solicitor asked C. N. Lominac,
(759) the witness who had given the foregoing testimony, the following questions, on redirect examination:

Q. Now, I will ask you what he said about the liquor in your presence, or what was said by his wife in his presence?

The following question was first put to the witness by the court:

Q. You can say anything he, himself, said—what the defendant said.

A. Mr. McIntosh brought these two kegs of whiskey and set it down on the porch, and Lawson Randall (defendant), said, "That is Brown's whiskey," and his wife said, "What Brown?" When defendant said, "That is Brown's whiskey," his wife said, "What Brown?" He said, "The Brown downstairs." She replied, "You know there isn't any Brown here. I have tried to get you to quit selling this liquor, and now I am through. There is no Brown here at all," and Lawson just dried up and walked away.

The defendant in apt time objected to all this testimony, on the ground that it was the wife's testimony against her husband. The court admitted it, and defendant excepted.

She said, "Now, I can't help it. You can just go," and she accused him of selling liquor. "I have kept you in my house and I have kept you up, and you never would do right, and now I am through."

The wife was not offered by the State as a witness and never testified as such against defendant.

Defendant told his wife that she hadn't been there for some time. In reply to that, she said, "Yes, sir, I have been working among white folks and in white folks' kitchens to keep you up, and you came to me for money the other day and told me you were going to get a job."

J. B. McIntosh testified: "I was a police officer and was present and helped search the premises of the defendant. Found liquor downstairs in the basement. It was in two kegs. I do not know how much kegs held—some say 4½ gallons and some say 5." Witness identified the two kegs. Found six in the front room, the northeast corner of the building. Searched the front part and found three or four kegs. "I think four empty kegs in the front room; that was the dining-room, part of it. In the back room, which is in the northeast corner of the building, back of the dresser I found one of these kegs with dust on it. In the northwest part of the building is a hallway about 6 feet wide, and behind that hallway is all sorts of junk, and in the bottom of a big barrel I found the other keg, all covered up with trash. Randall said it was not his, but a boarder's. He called the name of the boarder, and I think it was Brown. Randall's wife was upstairs, and she was sitting on the back porch crying. She broke down when I came out to them, and made about the same statement as that related above, to wit, the conversation between his wife and the defendant."

Question (by the solicitor): What did she say? A. She told (760) him that she had kept him there. Defendant said whiskey wasn't his.

Q. What was said to him by his wife in your presence? A. She told him that she had upheld him for quite a while and tried to help him get the home, and that she had worked like a poor negro and tried to keep him up; and she told him that he ran around and boot-legged and kept them down, and that she was through with him. He did not deny it.

Defendant's objection to all this evidence was overruled and he excepted.

We do not see why this testimony was not competent. Conversations between husband and wife are not privileged as confidential, so as to prevent a third person, who overheard them, from being competent as a witness to relate them to the jury. *S. v. Wallace,* 162 N. C., 622; 2 Chamberlayne on Evidence, sec. 1430, p. 2339; Wharton on Criminal Evidence, sec. 398; 40 Cyc., 2359; 6 Enc. of Evidence, 907.

In the *Wallace case Justice Allen* has, with his usual diligent and discriminating research, given us the pith of the learning upon this subject. He there says: "The authorities seem to be uniform that a third person may testify to an oral communication between husband and wife, although his presence was not known; but there is much diversity of opinion as to the right to introduce a writing from one to the other in the hands of a third person. The cases are collected in the notes to *Gross v. State,* 33 L. R. A. (N. S.), 478, and *Hammons v. State,* 3 A. and E., Anno. Cases, 915. It is difficult to find a satisfactory reason for the distinction. The rule of the common law is based on the confidential relationship existing between husband and wife, and the importance to the public of maintaining this relationship, deeming it wiser and more conducive to the public interest for some particular evidence to be suppressed than to require the husband or wife to disclose a communication between them, as to do so 'might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience.' *S. v. Brittain,* 117 N. C., 785. But the inhibition is as to the husband or wife, and not to a third person, and if the communication by the husband is in writing, and is procured by a third person, without the consent or privity of the wife, the reason for the exclusion of communications at common law no longer exists. In our opinion, the rule is stated correctly in Whar. Cr. Ev., sec. 398: 'Confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations, covering, therefore, admissions by silence as well as admissions by words. The privilege, however, is personal to the parties; a third person who happened to overhear a confidential conversation between husband and wife may be examined as to such conversation. A letter, also, written confidentially by
(761) husband to wife, is admissible against the husband, when brought

into court by a third party.'" No authority could have been adduced which more closely applies to the facts of this case.

The same rule of evidence was applied in *Toole v. Toole,* 109 N. C., 615, where the plaintiff, who had charged his wife with adultery, one Palmer being corespondent, was permitted to show by a third person, as a witness, a conversation between himself and wife in which he had forbidden her to go with Palmer, or where he was. The evidence was admitted below by the presiding judge to show the adulterous intimacy; to contradict a former witness who had testified as to friendly relations between Palmer and the husband and as sustaining plaintiff's statement that the adulterous intercourse was without his consent or connivance. This Court held the evidence competent and not inhibited by The Code, secs. 588, 1351, as declarations of the wife or the husband. *Chief Justice Merrimon,* in closing the opinion of the Court said: "The evidence was in no proper sense that of the plaintiff or the defendant, and therefore incompetent under the statute (Code, secs. 588, 1351). It was evidence of a third person, and competent in the aspects of the case above pointed out." That decision was strongly approved in the same case on a second appeal (112 N. C., 152). *Justice Avery,* in that case, said: "Confidential communications between husband and wife are privileged, and neither is compelled to divulge them upon the witness stand; but the testimony of Lillie Graham that she saw Palmer in the bedroom of the defendant, and at the trestle in company with her, was competent in itself, and when considered in connection with the previous declaration of the plaintiff, made to defendant in the presence of the witness, as to her disregard of his express wishes, becomes material, because it makes her conduct appear much more suspicious. The language used by the husband about a week before, viz., 'Laura, I have told you before, and tell you again, I don't want to catch Palmer at my house any more,' was not a confidential communication between husband and wife, but a command uttered in the presence of another, the disregard of which tended to prove her infatuation for Palmer. If, then, we should concede that confidential communications between husband and wife are not simply privileged as to them, but cannot be proven even by a third person, and though neither husband nor wife is competent or compellable to testify directly as to the adulterous acts charged, according to a proper interpretation of the statute (The Code, sec. 588) this was not such a communication, and being offered in connection with her conduct and proven by a third person, was competent. But similar testimony was declared, when this case was heard on the former appeal, *Toole v. Toole,* 109 N. C., 615, to be competent as tending to show adulterous intercourse as well as for the purpose of contradicting the witness, who testified that plaintiff had employed Palmer to stay (762)

with his family. It is therefore needless to discuss this point at greater length."

And mind you, that was a divorce suit, where the Legislature has been so particular to safeguard confidential communications between husband and wife as well as the sacredness of the marriage tie and the preservation of marital confidence and harmony.

In *S. v. Record,* 151 N. C., 695, it was held that while the wife is not a competent witness against her husband in the trial of an indictment, her declarations in his presence, of a nature and made under circumstances naturally and reasonably calling for a reply from him, if untrue, and concerning which he remained silent, are competent when tending to show his guilt of the offense charged. *People v. McRea,* 32 Cal., 100; *Richardson v. State,* 82 Wisc., 172; Abbott's Cr. Trial Briefs, p. 561, sec. 284; *Rex v. Bartlett,* 7 Car. & P., 832; *Rex v. Smithers,* 6 Car. & P., 332; *S. v. Bowman,* 80 N. C., 432; *S. v. Burton,* 94 N C., 947. Conversations between husband and wife about the sale of liquor by each were admitted in *S. v. Seahorn,* 166 N. C., 373, without objection on the ground here taken, though strenuously opposed for other reasons. We have held that the law does not exclude the testimony of the husband, in an action brought by him against another for criminal conversation and the alienation of his wife's affections, as to the conduct of the latter tending to show her guilt, because he does not testify against her, she not being a party to the suit. *Powell v. Strickland,* 163 N. C., 393. So here the wife is not testifying, as a witness, against her husband, which is the converse of that case.

The last exception is without any merit. When the court asked counsel whether they desired to address the jury, if the question was improper or prejudicial, and we are unable to see that it was under the circumstances, defendant should have objected at once, and not have waited until he could take a chance on the verdict, and then, after he had lost by his conviction, object for the first time. He who would save his rights must be reasonably prompt and diligent in asserting them. It was too late after verdict to enter an objection, if it would have been good had it been made in due time. *S. v. Tyson,* 133 N. C., 692; *S. v. Murray,* 139 N. C., 540; *Alley v. Howell,* 141 N. C., 113; *S. v. Houston,* 155 N. C., 432.

We have given careful consideration to all the exceptions, and find that no error was committed at the trial.

No error.

Cited: *S. v. Bean,* 175 N. C. 752 (1j); *S. v. Martin,* 182 N. C. 851 (2g); *S. v. Butler,* 185 N. C. 626 (2b); *S. v Freeman,* 197 N. C. 378 (2f); *S. v. Freeman,* 197 N. C. 380 (2j); *S. v. Portie,* 200 N. C. 146,

147 (2g); *S. v. Banks,* 204 N. C. 238 (2d); *S. v. Wilson,* 205 N. C. 380 (2p); *S. v. Langley,* 209 N. C. 181 (1f).

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STATE v. JOHN PEEBLES.

(Filed 22 December, 1915.)

Evidence—Homicide—Declarations—Res Gestæ.

Declarations to be competent as a part of the *res gestæ* must not relate to a past completed transaction; and declarations of the deceased as to the defendant's careless handling of a pistol which accidentally fired and caused the wound resulting in his death are not competent on the trial for the homicide, when not made at the time of the shooting, but a short time thereafter.

APPEAL by defendant from *Webb, J.,* at July Term, 1915, of HAYWOOD.

Indictment for murder. The defendant was tried for murder in the second degree and convicted of manslaughter, and from the judgment rendered appealed.

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

Smathers & Clark for defendant.

BROWN, J. The defendant was convicted of manslaughter in the killing of one A. M. Bennett. The testimony tended to prove that the defendant was assistant postmaster and agent for a railroad at Sunburst, N. C., and that the homicide occurred in the station office of the railroad company. It is due to the defendant to say that there is no evidence of any intentional killing, but the evidence for the State tends to prove that the death of Bennett was caused by a careless handling of a pistol by the defendant, and upon that theory he was convicted of manslaughter.

During the trial one Cola Allen, the State's witness, was permitted to testify over the defendant's objections as to the declarations of the deceased. The question was asked this witness: "What did Mr. Bennett say?" Witness testified: "I asked him a question first; asked him if it hit him, and he said 'Yes, it did.' And almost immediately afterwards, he said: 'I told John to keep that gun away from my direction.'"

This declaration was admitted as part of the res gestæ. The evidence shows that the declaration was not made at the time of the shooting, but a short while thereafter. We are of opinion that the testimony was

improperly admitted. It is fundamental that in order for a declaration to be received in evidence as a part of the *res gestæ* it must be a part of the main transaction and in time so closely related to it that the declarant has had no time or opportunity to premeditate about what he shall say in the declaration.

In *Harper v. Dale,* 92 N. C., 394, it is said: "Declarations to become a part of the *res gestæ* must be made at the time of the act
(764) done and must be such as are calculated to unfold the nature and quality of the facts they are intended to explain and to so harmonize with them as to obviously constitute one transaction."

In *Bumgardner v. R. R.,* 132 N. C., 439, it was held that in an action against a railroad company for personal injuries a statement of a person to the party injured a very short time after the accident relative to the condition of the train is not a part of the *res gestæ* and is not competent.

In *Parker v. State,* 136 Ind., 234, 35 N. E., 1105, the following was excluded as a part of the *res gestæ:* Where deceased, immediately after being shot in his drug store, ran upstairs and, falling in his wife's arms, exclaimed, "My God! I am shot; those colored fellows that were in there when you were there were the ones that shot me." It was held that the declaration as to who shot him is not admissible as a part of the *res gestæ.*

In *Pledger v. Chicago, B. and Q. R. R. Co.,* 69 N. W., 1057, in a personal injury action, the declarant was asked this question: "Were you on the train?" He replied: "Yes; the brakeman pushed me off, and I believe my foot is cut off." The exclusion of this evidence was held no error. In *S. v. McDaniel,* 68 S. C., it was held that statements made by the defendant two minutes after the shooting, after he had gone two or three hundred feet, were not a part of the *res gestæ,* not only because of time and place, but apparently on the ground that they were not spontaneous utterances.

We think the testimony admitted in this case is distinctly a narrative of a past, completed transaction, and is not admissible as a part of the *res gestæ. Simon v. Manning,* 99 N. C., 331; 11 Enc. Ev., p. 313.

New trial.

Cited: Staley v. Park, 202 N. C. 158 (g).

STATE v. BOB BEAL.

(Filed 22 December, 1915.)

1. Appeal and Error—Assault—Deadly Weapon—Question of Law—Harmless Error—Criminal Law.

As to whether a weapon used in making an assault is *per se* a deadly weapon may depend upon its size and character, the manner of its use, the size and strength of the person using it, and the person upon whom it is used; and the trial judge in this case, wherein a rock the size of a man's fist was used, having submitted the question to the determination of the jury, under correct instructions, any error he may have committed in not holding the rock to be a deadly weapon as a matter of law is cured by an affirmative finding of the jury.

2. Assaults—Arrests—Warrants—Officers—Criminal Law.

An officer of the law authorized to make arrests for its violation is not required to show his warrant for the arrest if he is known as such to the person being arrested by him.

3. Arrest—Resisting Officer—Assault—Justification—Criminal Law.

An officer having a warrant for the arrest of an alleged offender was temporarily without his warrant when the arrest was made, and the offender, without requiring that the warrant be shown him, went along peaceably and without resistance; but his brother, running up, demanded that the warrant be shown, and this not being done, he struck the officer with a rock the size of his fist and knocked him down. *Held*, the brother in thus making the assault acted without legal excuse or justification.

4. Courts—Expression of Opinion—Statutes—Appeal and Error.

Where the prisoner is indicted for an assault upon an officer, and it appears that the assault was made while the officer was arresting another person, it is reversible error for the trial judge to charge the jury that the defendant would have been guilty of resisting an officer in the discharge of his duties had the indictment so charged, when the evidence is conflicting, for such is an intimation of opinion by the judge prohibited by our statute.

CRIMINAL ACTION for assault with a deadly weapon, to wit, with (765) a rock weighing 3 pounds, tried before *Cline, J.*, and a jury, at April Term, 1915, of MACON.

The defendant was indicted for an assault with a deadly weapon, to wit, a rock weighing about 3 pounds. The evidence tends to show that a warrant had been issued and delivered to an officer for the arrest of Harworth Beal, a brother of the defendant; that on the night of the alleged assault the officer saw the party for whom he had the warrant in a tent of some kind in the town of Highlands. The officer had carried the warrant with him for the purpose of making the arrest, but at that time he did not have it with him, having left it in his home, about a

half-mile away. Under these circumstances he arrested Harworth Beal, who made no resistance of any kind, but went quietly with the officer. The defendant followed, and when the officer, with his prisoner, had gone about 100 yards, the defendant asked the officer to show his warrant, and, upon his failure to do so, the defendant immediately struck the officer with the rock, as large as the officer's fist, on the head and knocked him down, and "addled" him.

Defendant was convicted of an assault with a deadly weapon, and from the judgment he appealed.

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

J. Frank Ray for defendant.

WALKER, J., after stating the case: The defendant assigned three errors. The court failed to instruct the jury, as requested, that the defendant had the right to interfere and demand the production of the warrant, and, this being refused, to knock the officer down with the rock in order to rescue his brother; but in this we see no error, if the jury find the facts to be as the witness stated them. *Justice Hoke* said in *S. v. Hill,* 141 N. C., 769, 771: "It is true, as a general rule, or
(766) under ordinary conditions, that the law does not justify or excuse the use of a deadly weapon to repel a simple assault. This principle does not apply, however, where from the testimony it may be inferred that the use of such weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm, such person having been in no default in bringing on or unlawfully entering into the difficulty," citing *S. v. Matthews,* 78 N. C., 523.

Whether a weapon is deadly does not depend so much upon the result of its use, which may be considered, as upon its size and character, the manner of its use, the size and strength of the person using it, and the person upon whom it is used, and, perhaps, other circumstances tending to throw light upon the question, all of which must be regarded by the court in determining whether or no the particular weapon is deadly. There are some instruments which are deadly *per se,* such as a gun, pistol, large knife, bar of iron, a club or bludgeon. A heavy oaken staff has been declared to be so. *S. v. Phillips,* 104 N. C., 786; *S. v. Sinclair,* 120 N. C., 603. The character of the weapon, as being deadly or not, does not necessarily depend upon the fact whether or no death actually ensues from its use in the particular case; for a weapon known to be deadly, and so considered by the law, may not produce that result when used in a given case, while one not deadly *per se* may cause death by the

manner of its use. So that all the facts and circumstances should be examined by the court in passing upon the question.

Justice Avery, in *S. v. Phillips, supra,* when quoting from *S. v. Porter,* 101 N. C., 713, said: "The instrument, while called a deadly weapon, is designated simply as a stick, with no description of its size, weight, or other qualities or proportions, from which it can be seen to be a dangerous or deadly implement, calculated, in its use, to put in peril his life or inflict great physical injury upon the assailed." He quotes from *Judge Ruffin* in *S. v. West,* 51 N. C., 505: "Whether an instrument or weapon be a deadly one is, at least generally speaking, for the decision of the court, because it is a matter of reason that it is or not likely to do great bodily harm which determines its character in this respect. *S. v. Crater,* 28 N. C., 164."

A deadly weapon is defined to be one which, if not of the class mentioned as so *per se,* would likely cause death or great bodily harm, considering the manner and circumstances of its use. In the case last cited it is said, at p. 605: "As to whether an instrument used in as assault and battery is a deadly weapon or not is generally a question of law. *S. v. Huntley,* 91 N. C., 617; *S. v. West,* 51 N. C., 505; *S. v. Craton,* 28 N. C., 164: *S. v. Collins,* 30 N. C., 407. This question has been submitted to the jury, in a few cases, where the matter was left in doubt by conflicting evidence as to the size of the weapon used and the manner in which it was used, and such submissions to the jury have been approved by this Court." But we need not decide as to (767) whether or no this rock was *per se* deadly, as the court submitted the question to the jury and they found that it was, under an instruction directing them to consider the matter of its use and the other circumstances attending the assault with it and relevant to the question, as was suggested should be done in *S. v. Archbell,* 139 N. C., 537. "Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used," the question is for the jury. *S. v. Archbell, supra,* citing *S. v. Huntley,* 91 N. C., 621. See, also, *S. v. Norwood,* 115 N. C., 780.

If it is a deadly weapon *per se,* and the court failed so to instruct the jury, the latter corrected the error by the verdict. If its character as being deadly or not depended upon the facts and circumstances, it became a question for the jury with proper instructions from the court. The officer was not bound to show his warrant, if he had one, when he made the arrest, if he was known to be an officer. *S. v. Curtis,* 2 N. C., 471; *S. v. Garrett,* 60 N. C., 144; *S. v. Belk,* 76 N. C., 10; *S. v. Dula,* 100 N. C., 117. The law is thus stated in the *Belk case:* "It is true that if a person lawfully arrested resists with violence to the officer, he is guilty of an assault, if he knows or is notified that the officer is one.

S. v. Kirby, 24 N. C., 201; *S. v. Bryant,* 65 N. C., 327. But if the officer has no authority to make the arrest, or, having the authority, is not known to be an officer, and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person. 1 East P. C. pp. 309, 312, 314; *S. v. Kirby* and *S. v. Bryant, ante.*" And the same principle, somewhat differently worded, was thus stated in the *Dula case:* "If the officer be a known officer of the district in which he is acting he need not show his warrant when he makes the arrest; but if he is an officer appointed for a special purpose he ought to show his warrant, if demanded. In *S. v. Garrett,* 60 N. C., 144, it is said that one who is not a known officer ought to show his warrant, and read it, if required; but even when required, as was done in that case, he is not made a trespasser *ab initio* if the party to be arrested knew he had the warrant."

In this case it appears that Harworth Beal made no resistance when he was arrested, and did not demand the production of the warrant or the authority of the officer to take him into custody, but went with the officer quietly and peaceably, and without the slightest protest, if the jury find these to be the facts from the evidence. Under these circumstances we think that the interference of the defendant and the assault on the officer were without legal excuse or justification. He had no right to demand a warrant, and there was no reason why he should have assaulted the officer with such violence. There was nothing in the situation of his brother that called for such action on his part. The officer had a
(768) warrant for him, he submitted unresistingly to the arrest and never demanded that the officer show his warrant or other authority. The officer, being known as such, was therefore not violating the law, and defendant's attack upon him was unlawful. But what we have said is all based upon the assumption of a finding by the jury according to the evidence as now presented.

We must not be understood as justifying this or any other officer in arresting without warrant, except where allowed by law. An officer should obey the law as well as other persons, and, when he does so, the law will protect him while in the execution of its process.

This covers two of the assignments.

But we must grant a new trial because the court told the jury that, in his view, if the solicitor had seen proper to charge defendant with resisting an officer in the performance of his duty he would have been guilty. This was an expression of opinion upon the facts, in other words, that the witness had told the truth about the matter, and upon his testimony defendant would be guilty of resisting an officer. He could not be guilty of that crime unless the witness had testified truthfully. The judge may have meant that if the jury should find the facts

to be as they were stated by the witness, defendant would have been guilty of resisting the officer, and this would not have been any intimation of opinion upon the weight of the evidence; but that is not what was said, and the remark of the court was calculated to impress the jury with the belief that in the opinion of the court the fact that he had resisted the officer by assaulting him had been fully proved, and all that was in the way of a conviction therefor was a proper indictment. We are sure that the learned and careful judge did not intend to convey any such meaning by his language, and that it was merely an inadvertence; but the harm was done, though innocently, and without regard to the intention. This must result in a new trial. *S. v. Dick,* 60 N. C., 440; *Withers v. Lane,* 144 N. C., 184. We cannot tell to what extent the defendant was prejudiced by this remark, or his rights before the jury impaired. It is the mandate of the statute that there should be no intimation of opinion by the judge, whether consciously or not, and as said in *S. v. Dick, supra,* "the law has spoken, and we have only to obey," even though, in this case, we are thoroughly convinced that it was an inadvertence on the part of the learned, just, and impartial judge, caused by his own impression of the evidence, which may have been fully warranted.

There is also an error in regard to the doctrine of reasonable doubt, the opening sentence of the charge confining it, by implication, to the single question whether defendant used a deadly weapon. The new trial, though, is given upon the other ground.

New trial

Cited: S. v. Sullivan, 193 N. C. 757 (4g); *S. v. Watkins,* 200 N. C. 694 (1f); *S. v. Hightower,* 226 N. C. 65 (1g); *S. v. Perry,* 226 N. C. 535, 536 (1g).

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STATE v. JESSE UPTON.

(Filed 22 December, 1915.)

1. Homicide—Murder—Solicitors—Demand for Conviction in Second Degree—Trial—Capital Felony.

Where the defendant is indicted for murder in the first degree and the solicitor at the time of calling the case for trial announces he will not ask for a verdict in the first degree, and an entry of record is accordingly made, the trial is not for a capital felony.

2. Homicide—Murder—Mistrials—Court's Discretion—Appeal and Error.

Where, without the knowledge of the court or the parties, and after the jury has been selected, sworn, and impaneled, it is discovered that one of

them is disqualified to act, for nonresidence in the State, and the trial is for a homicide less than a capital felony, it is within the sound discretion of the court to withdraw a juror and order a mistrial, which is not subject to review on appeal. If for a capital felony, the court may withdraw a juror and order a mistrial, when "necessary to attain the ends of justice," and upon exception duly taken, find the facts, from which an appeal lies as a matter of right. If no such exception is aptly taken, it is within the court's discretion to permit, thereafter, the objecting party to challenge the juror.

3. Criminal Law—Homicide—Trials—Mistrials—Orders of Court—Appeal and Error.

The action of the trial judge, on a trial for homicide, in withdrawing a juror, discharging the other jurors, and again beginning the trial, is in effect an order for a mistrial, whether these words were used by the court or not.

APPEAL by defendant from *Cline, J.*, at Spring Term, 1915, of SWAIN.

Attorney-General Bickett, Assistant Attorney-General Calvert, and Martin, Rollins & Wright for the State.

Bryson & Black and A. S. Patterson for defendant.

CLARK, C. J. The defendant was indicted for murder in the first degree, but when the case was called, and before any jurors were selected, the solicitor announced that he would not ask for a verdict of murder in the first degree, and an entry was made in the record to that affect. It follows that the trial was not for a capital felony. *S. v. Hunt,* 128 N. C., 584; *S. v. Caldwell,* 129 N. C., 682.

When the case was called for trial both sides announced themselves in readiness. A jury was selected, sworn, and impaneled. After the solicitor had read the indictment the attention of the court was called to the fact that one of the jurors was not a citizen and resident of Swain County. This was not previously known to the counsel on either side nor to the court. Counsel on both sides expressed the opinion to the court that if the trial were continued with such juror in the box the irregularity would vitiate the result. Thereupon the court ordered a mistrial and discharged the juror and the entire jury and began
(770) the trial of the case anew, each one of the jurors being passed upon by the State and defendant. The defendant made no exception when the juror was withdrawn and made his exception only when the new jury was impaneled.

The court did not use the words "mistrial ordered," but his withdrawal and discharge of the juror and the discharge of the other jurors and beginning the trial over again was an order for a mistrial.

The trial was for a felony, not capital, and it was discretionary with the judge to order a mistrial. *S. v. Collins,* 115 N. C., 716, citing *S. v. Johnson,* 75 N. C., 123, where *Pearson, C. J.,* said that if on the trial for a capital offense the judge directs a mistrial, he is required to find the facts, and his action is subject to review on appeal; but that on trial for a felony not capital, or for a lesser offense, the discretion of the presiding judge in making a mistrial is not subject to review, for he has the discretion to do so whenever he believes it proper in furtherance of justice, citing *S. v. Weaver,* 35 N. C., 203; *Brady v. Beason,* 28 N. C., 425.

Even if this had been a trial for capital felony, it would not have been error for the court to have made a mistrial "when necessary to attain the ends of justice." *S. v. Guthrie,* 145 N. C., 495; *S. v. Tyson,* 138 N. C., 627, which is cited in *S. v. Dry,* 152 N. C., 813. In the last case a prisoner on trial for capital felony absented himself from court. On discovery of this the judge asked his counsel if he intended to except because of the prisoner's absence, and he said that he did. The judge then ordered a mistrial, and refused a motion for the discharge of the prisoners, there being two on trial. This Court said: "In reply to the inquiry of the court, the counsel of the prisoners, who were on trial together for the homicide, committed jointly, frankly admitted that they would insist upon the nullity of the whole proceeding because of the absence of one of them from the courtroom during part of the time the jury was being selected." The Court further said: "If their contention was correct that the further trial would be a nullity, and the prisoners cannot be heard to the contrary, the prisoners were not in jeopardy and the mistrial was properly ordered; but that if the temporary absence of the prisoner by his own volition would not have had that effect, still the court might well, in the interests of justice, refuse to go on with an important trial with such an objection pending, whose effect would be to place the State at a great disadvantage."

In that case the Court also said that in the Federal courts and in most of the other States a mistrial in a capital felony rests in the sound discretion of the trial judge, as it does in all other cases with us, and that while we have not gone that far, we have modified the stringent rules heretofore prevailing, and that a mistrial in a capital felony can now be made when it is necessary to attain the ends of justice. However, in this case, which is not for a capital felony, the mistrial was in (771) the discretion of the judge.

We would not, however, be understood as holding that if the trial had proceeded with the juror in the box not excepted to, it would have vitiated the verdict. *S. v. White,* 68 N. C., 159, where a nonresident sat on the jury.

The counsel for the State contend rightly that when an incompetent juror is permitted by the defendant to try his case without objection it does not vitiate the verdict. *S. v. White,* 68 N. C., 159; *S. v. Douglas,* 63 N. C., 501.

In *S. v. Lambert,* 93 N. C., 618, where the defendant was tried and convicted of murder in the first degree the Court held: "A challenge to a juror for cause must be made in apt time. It is too late after the juror has been accepted by the prisoner, and has served on the trial. When the incompetency of the juror is not discovered until after the verdict, it is a matter of discretion for the judge to grant a new trial or not. His refusal to do so is not reviewable. In that case the juror on his *voir dire,* after being sworn and before taking his seat in the jury box, remarked, loud enough to be heard by the court and counsel, that he was not 21; but no objection was made to the juror by the prisoner till after the verdict. The court held that when the juror came to the book to be sworn on his challenge for cause, the prisoner should then and there have made known his objection, and, not having done so, the prisoner cannot afterwards except. This is subject, however, to the rule that the court can in its own discretion afterwards make a mistrial, even in a capital case, if the defect was to a disqualification of the jurors, which was "not discovered until after he was tendered and accepted by the prisoner and sworn," adding that even after that, if the prisoner had moved for leave to challenge the juror for cause, the court could allow the challenge in its discretion and not as a matter of right, citing *S. v. Adair,* 68 N. C., 68.

S. v. Lambert was cited and approved in *S. v. Council,* 129 N. C., 517, which cited many cases, as where the juror had been incompetent because a minor, *S. v. Lambert,* 93 N. C., 618; or an atheist, *S. v. Davis,* 80 N. C., 412; or not a freeholder, *S. v. Crawford,* 3 N. C., 485; or a nonresident, *S. v. White,* 68 N. C., 159; or related, *Baxter v. Wilson,* 95 N. C., 137, and there have been cases to the same effect since, *S. v. Maultsby,* 130 N. C., 665; *S. v. Lipscomb (Walker, J.),* 134 N. C., 697, and there are still others.

The other exceptions do not require discussion.

No error.

Cited: S. v. Cain, 175 N. C. 830 (2g); *S. v. Levy,* 187 N. C. 585, 588 (2p); *Hinton v. Hinton,* 196 N. C. 342 (2p); *S. v. Beal,* 199 N. C. 295 (2g); *S. v. Ellis,* 200 N. C. 79 (2g); *S. v. Lea,* 203 N. C., 321 (2p); *S. v. Sheffield,* 206 N. C. 387 (2p); *S. v. Watson,* 209 N. C. 231 (2p); *S. v. Dove,* 222 N. C. 163 (2f); *S. v. Emery,* 224 N. C. 588 (2p).

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STATE v. SAMUEL PRESTON CHRISTY AND IDA BALL WARREN.

(Filed 12 January, 1916.)

1. Jury—Homicide—Criminal Law—Challenge for Cause.

Questions asked jurors by the solicitor on a trial for a capital felony for the purpose of ascertaining whether they belonged to the Society of Friends, who have conscientious objections to capital punishment, is not a challenge for cause, which the prisoner may admit and stand the juror aside.

2. Homicide—Trials—Evidence—Letters.

Upon a trial of a wife for the murder of her husband, with evidence tending to show her guilt and knowledge of its having been committed by another, it is competent to show she had in her possession a letter immaterial to the issue, which she claimed to have received from him after his death, for the purpose of sustaining her statement that he was then on a visit to his sick mother.

3. Homicide—Evidence—Confession.

Where several defendants are on trial for a homicide, and confessions of one are introduced in evidence, it would not be reversible error for the trial judge to omit to instruct the jury that such were not competent against the others, unless the appellant asks at the time of the admission that their purpose be so restricted. Supreme Court Rules, 164 N.C. 548.

4. Appeal and Error—Confessions—Evidence Restricted—Objections.

Objection that a confession made by one charged with a capital offense was not voluntary will not be reviewed on appeal when the trial judge has otherwise found as a fact and there is evidence to support the finding. The evidence in this case is held sufficient.

5. Homicide—Conspiracy—Trials—Evidence—Questions for Jury.

Evidence of a conspiracy to commit murder of the husband of the *feme* defendant is sufficient which tends to show, on the part of the man, that he had been living unlawfully with the woman; that the deceased ran off with the woman and married her; that he followed them to another State, where he visited her, and they laid plans to kill her husband, who was murdered in her home when the prisoner was present and with his knowledge, and that he concealed and carried off the body, weighted it and threw it in a creek, etc.; and on the part of the woman, that she secretly received the man at her house and in her room, etc.; that the crime was committed in her home; that she made no outcry, knowing the deed was being done, and furnished the trunk in which the body was concealed and saw it carried away, and that she stated she had "planned the murder," etc.

APPEAL by Christy and Warren from *Cline, J.*, at July Term, 1915, of FORSYTH.

S. P. Christy, Ida Ball Warren, and Clifford Stonestreet were indicted for the murder of one G. J. Warren. The defendants Christy

and Warren were found guilty of murder in the first degree, and appealed to this Court. The defendant Stonestreet was found guilty of being an accessory after the fact, and does not appeal.

The evidence tends to show that Ida Ball Warren was born in Forsyth County, near Muddy Creek, about 9 miles from Winston-Salem. At the time of her trial she was 36 years old. She lived in Forsyth
(773) County until she was 25 years old, and at that age had established an unsavory reputation. She became acquainted with the defendant Christy before she left Forsyth, and it seems that the two went to Lynchburg, where for a time they lived together, and subsequently they went to Grand Saline, Texas, and, without being married, continued to live together. Christy was a fireman on the Texas Short Line Railroad and Warren boarded with him and his supposed wife.

In 1912 the defendant Warren left Christy, and in company with the deceased, G. J. Warren, came to Winston-Salem, and the two were married immediately after their arrival in that city. Upon coming home from one of his runs, Christy found that the woman and Warren had gone away and had taken all the money he had saved up. He immediately followed them to North Carolina for the purpose, he says, of getting a portion of his money back. He spent only one night in Forsyth County, and then returned to Texas. He did not see Mrs. Warren or the deceased, Warren, on this trip.

In January, 1914, Christy came to Winston-Salem again, saw Mrs. Warren, and after a few days went back to Texas.

In July, 1914, Christy came to Winston-Salem again, arriving there about 11:30 at night. He called up Mrs. Warren on the phone and at once went to the Piedmont boarding-house, which was then being run by Mrs. Warren, and spent the night. Mr. Warren did not know that Christy spent the night in the hotel. Christy got up early the next morning in order to avoid Warren, and went to the home of Mrs. Stonestreet, an illegitimate daughter of Mrs. Warren, and arranged to board there. At Mrs. Stonestreet's the defendants Christy and Warren saw each other every day or two.

On 18 July G. J. Warren disappeared, and has never since been seen alive. On 25 August, 1914, the body of a man was found in Muddy Creek. Two iron weights, one weighing 17 3/4 and the other 68 pounds, had been tied to the body. A rope was tied around the knees of the body and another piece of rope was wrapped tight around the neck several times. The face was badly mutilated on the left side and the teeth in the left lower jaw were broken out and the jaw-bone was broken. There was also a crack in the skull. An inquest was held and the body carried to Vogler's morgue. Subsequently the body was buried in the county cemetery. At this time the body was not identified, no one was

accused of the crime, and the affair was generally spoken of as the Muddy Creek mystery.

About 1 March, 1915, the chief of police of the city of Winston, having received inquiries about G. J. Warren, called on Mrs. Warren at the Piedmont boarding-house and asked if her husband was in, stating at the same time that he, the officer, had a letter in his possession making inquiries in regard to the said G. J. Warren. Mrs. Warren stated that her husband had received a telegram from his mother in (774) August saying she was sick, and that he had left home in August to be at his mother's bedside. She further stated that she had gotten a letter from her husband on 22 October. She told the officer that she had sent out a number of letters in her endeavor to locate her husband. The officer spoke to her about the body which had been at Vogler's morgue, and she said that she had been told that the body was so mutilated and decomposed that she did not think anybody would recognize it; that she did not think about it being Mr. Warren and did not go to see it.

Thereafter, about 1 April, the body which had been found in Muddy Creek, and which had been kept at Vogler's morgue and then buried in the county cemetery, was exhumed and was identified as the body of G. J. Warren. Mrs. Warren was arrested, and after her arrest, without any threat or inducement of any sort on the part of the officers or any one else, she made a statement, the court cautioning the jury at the time that what she said could be considered only against her, and was no evidence against and could not be considered against the defendants Christy and Stonestreet. This statement is as follows:

STATEMENT OF IDA BALL WARREN.

"She stated that on the morning of 18 August she got up about 4 o'clock in the morning and went into the dining-room to begin to prepare for her breakfast; that she had been in the dining-room a few minutes when Christy came in; she said she had left Mr. Warren in the bed asleep. She said Christy came into the dining-room and told her that he had choked Mr. Warren to death, and then Christy went back in the room. She said that he, Christy, then went in her bedroom and put the body in a trunk. I asked her whose trunk, and she said 'Ours.' Took the trunk and carried it and placed in room No. 14, and it remained there until about 10 o'clock that day. That Christy drove up in front of the Piedmont House with a two-horse hack, and a negro that was unknown to her came up the steps with him, and they took the trunk and carried it down from room No. 14 to the street, where the hack was standing; that he went to the barber shop, called another negro to help him lift the trunk into the hack. Sheriff asked her if they carried the trunk clear as they went down the steps; she said no, they kind

of bumped it down. That she went out on the veranda of the hotel and saw them lift the trunk into the hack and saw Christy drive off, and she never had such feelings in her life as she did while they were taking down the trunk and placing it in the hack; she said when she looked at herself in the glass that she was as white as chalk."

STATEMENT OF CLIFFORD STONESTREET.

After the foregoing statement of Ida Ball Warren the chief of police went to see Clifford Stonestreet and asked him to walk around to
(775) the office of the chief. Stonestreet said he knew nothing about Warren's watch, whereupon the officer said, "Suppose I told you that your mother-in-law told me she gave you the watch?" Stonestreet replied, "I would say that it was not true." Officer: "Suppose she were to face you with that?" Stonestreet: "I would tell her she was a damned lie." Officer: "We will go to the jail and see whether you will or not."

The sheriff of the county and the chief of police then went with Stonestreet to the jail and into the room where Mrs. Warren was confined. The sheriff then called her to the door and said, "Mrs. Warren, was it the next morning or the next afternoon that you gave Clifford that watch?" Mrs. Warren said she did not remember, but that it was two or three days after Warren was killed, and that she told him he could have the watch; that it was lying on the dresser. Thereupon Stonestreet turned around to the sheriff and the chief and said: "Come on; let's go and get it. She has told all she knows." They then went back to the Piedmont boarding-house, and Stonestreet walked back toward the kitchen and handed the chief the watch. Thereafter Stonestreet was arrested and placed in jail. At this time Christy was under arrest in Texas, but had not been brought back to North Carolina. After his arrest and while he was in jail, without any threats or promises on the part of the officers, Stonestreet told the officers that the night after the body had been placed in Muddy Creek, Christy and Mrs. Stonestreet were sitting in their bedroom at their home on West Sixth Street. He said that on the night of the 19th there was a trunk put in his basement; that he saw the trunk in the basement. He said that he did not take any part in the killing, but that he had knowledge of the killing after Warren's body had been put in the creek. After Christy had been brought back to North Carolina he was taken to the cell where Stonestreet was confined, and said to Stonestreet: "This is a pretty predicament you have all gotten me into." Stonestreet replied: "I got you into nothing." Christy said: "You went ahead and told all you knew about the part I took in the murder. Why did you not tell the part you taken?" Stonestreet said: "I have not played any part." Christy said: "You did not want to tell what you did, but I am going to tell it just like it was.

I do not deny the part I taken, and I am going to tell the truth about the part you taken." He said to Stonestreet: "Didn't you go with me to Muddy Creek that night and help put the body in the creek?" and Stonestreet said: "No, I did nothing of the kind." Christy: "You did not hit him in the face with a short-handled axe?" Stonestreet: "No, I didn't." Christy: "You haven't got a short-handled axe, with the handle sawed off, have you?" Stonestreet: "Yes; but who sawed the handle off?" Christy: "We are not talking about who sawed the handle off; we are talking about who hit Warren with it." Stonestreet then said he did not know a ———— thing about it; that he had not told (776) anything except what he had to tell, but that the old lady had told it all.

The sheriff of Forsyth and the chief of police of the city of Winston went to Texas after Christy, and on the way back, without any sort of inducement or threats, he, after being told that anything he said would be used against him if it bore upon the case, Christy made a statement to the officers, the court warning the jury repeatedly when this statement was admitted in evidence that it could not be considered against Warren or Stonestreet.

STATEMENT OF SAMUEL PRESTON CHRISTY.

He said he was living in Grand Saline, Texas, with Mrs. Warren. That he had a position on the Texas Short Line as fireman. That G. J. Warren was boarding at his house; that he made two runs a day; he left early in the morning and got back to Grand Saline, and did not have time to go home for his meals, and did not go home from the time he left early in the morning until some time in the forepart of the night. On arriving home the night Mrs. Warren left him, don't remember the date, he found Warren and Mrs. Warren were gone, and all the money he had saved up had been taken, except a check for $15 he had in his pocket. He found she had made several bills there, buying ladies' furnishings, bracelets, and some other stuff; that he took the $15 check and went down the road in the direction of Louisiana, thinking they had gone to Warren's home; that he got information that they had come to North Carolina; he went back and borrowed $50 and came to North Carolina in hope of getting some of his money back. He came here and went out to Will Henning's; had information they were there. He found Pearl there, Mrs. Stonestreet, daughter of Mrs. Warren. Mrs. Warren and Mr. Warren were not there. Mr. and Mrs. Henning got excited when he came in, thinking there would be trouble, but he told them all that he wanted was his money, or part of it, and he told them there would be no trouble. He stayed all night and did not get to see Mrs. Warren.

Mr. Henning went with him to the railroad; that he went to some

point in South Carolina, and from there went back to Grand Saline, Texas. In about five or six months he received a letter from Mrs. Warren. He said he received a letter from her begging him to come; so he came here in January. She wrote and told him where she was living, gave him the number and street address. When he got here she had designated a place in Fairview. He went in and stayed a short while, and she told him where he could get a room overnight. The room she directed him to was almost in front of Fairview market; said he secured the room and saw Warren as he went on to work. She told him to come back to her house the next morning; she wanted to have a talk with him. About 8 or 9 o'clock next morning he went back and stayed about two and one-half hours at her house. Mrs. Warren said Mr. Warren
(777) was mistreating her, and she could not stand his mistreatment. She told him Warren had been hurt, and that she had had a doctor with him, and waited on him, but that if he ever got hurt again she was going to give him the slip. Was not going to do anything for him. He told her if Warren was mistreating her to call in the officers; they were the proper ones to correct him. She said she could not afford to do that on account of her past life; that if she got into the courthouse he would expose her past life, and she could not afford to go into court. He said he stayed around for a few days and went back to Grand Saline. She wrote him to come and help her out of her trouble. He wrote her he was sick and unable to come, which was untrue. He said he thought he could throw her off. Said in July she kept writing to him, and he did not know what made him do it, but he came here. She wrote him that when he came to call her up; that he got in on the 11:35 train at night, and called her up from the depot. She said everything was all right, and to come to the Piedmont House. He went there and she put him in room No. 3 to spend the night. Told him where Mrs. Stonestreet was living, and for him to get up early next morning and go there before Warren got up, which he did. Said he saw her every day or two; that she would come to Mrs. Stonestreet's, and she was wanting him to make away with Warren. She tried to get him to go down to the tower where Warren was at work and shoot him. She said there in the dark he could shoot him and place his body on the track, and nobody would know about it, or know how it came there. She told him that she had tried to get rid of him by poisoning him; that she put Paris green in a bowl of soup on one occasion, and put in too much and he would not drink it, and on another occasion Mr. Call sent her a bottle of wine and when Warren came from work she asked him if he did not want a drink of wine, and he said "Yes." She got crushed ice and put in it, and got some quicksilver and put in it, and when he drank it he got the quicksilver in his mouth and would not drink it. Said the next plan was at

Stonestreet's house; they planned to kill him one Saturday night. They hired a horse and buggy and put it in the back yard, and their plan was to get Warren out there and knock him in the head and take him away with this horse and buggy and dispose of his body. They were to tell him Stonestreet's wife was sick in order to get him out there. It was on Saturday night, and Warren came and did not find things around there as he expected them to be, so he went back home, and they did not get to accomplish their purpose.

He said he got the horse and buggy from a livery stable on Main Street, near Salem Creek. He carried the horse and buggy up there, stayed in the back yard all night. Next morning Stonestreet took his wife and sister and went out driving to Mrs. Warren's old home place at Muddy Creek. Came back about 11 o'clock and he took the horse and buggy to the stable. He said the next morning they were out (778) at Stonestreet's house and Mrs. Warren said she knew of a plan now that would work. They could get some chloroform and she could chloroform him; then they could choke him to death and carry his body away. She said she had tried it and knew it would work. She had a small bottle that she had used on him once, and next morning he complained of being sleepy, and that if she had enough she knew it would work. She asked him to get a bottle of cholorform and if Stonestreet could get a bottle she would have plenty to do the work. Said he went out to McArthur's drug store and got a 25-cent bottle of chloroform, took it back to Stonestreet's house and give it to Stonestreet, and Stonestreet gave it to Mrs. Warren, and the next thing he knew about it was the morning of the murder. Said Stonestreet left home before breakfast early in the morning and came back for breakfast about 7 o'clock and told him he had Warren's body in the trunk and that now he would not bother anybody else, or would not give them any trouble. Said the understanding was that Stonestreet was to get a bottle of chloroform and Christy was to get a bottle and turn it over to Mrs. Warren; that she was to chloroform him; Stonestreet was to choke him to death, and that he was to take the trunk and make away with it. The morning of the murder Stonestreet came in and told him that he had the body in the trunk; he said he was to take the body out of the house about sundown. A little later after that Stonestreet told him the body was in the trunk, and told him that Mrs. Warren wanted him to get the trunk out of the house just as quick as he could; that the weather was so warm she was afraid the body would begin to smell, and the trunk begin to leak and the servants would notice it. Stonestreet told him to go to the livery stable and get a hack; said he went to Fisher's livery stable and got a hack about 10 o'clock. Told the liveryman to take out the back seat of the hack; that he was going to haul a trunk and would not need seats in it. Said he

got the hack and picked up a negro, did not know who, to help him bring the trunk down. He and the negro brought the trunk down from Mrs. Warren's bedroom. Did not tell where the trunk was sitting in the bedroom. The trunk was so heavy that he stepped to the Antiseptic Barber Shop and asked a boy to help him; said he gave him a 5-cent piece. Said Mrs. Warren and Stonestreet were both standing looking at him when he got in the hack. He got in the hack and started up Trade Street. Stonestreet passed him when he was on Trade Street, on a bicycle. Stonestreet went on home on Boulevard back to his house. Came back, passed a few words, and he went out in the direction of Pfafftown, turned off a road unused, playing for time, waiting for night; did not want to go to Muddy Creek until dark. About sundown he drove back to Stonestreet's house, same way he went out. Stonestreet came down there and got a short-handled axe, put it in the hack and got
(779) in the hack and drove back up Summit Street to Fourth Street and out to Hanes' Mill to Muddy Creek; drove as near as they could get the hack, and took the trunk out of the hack. Stonestreet carried it on across a field to the creek and opened it; took out the body and went back to the hack and got the weights, carried them there and put them to Warren's body. Stonestreet took a short-handled axe, hit him one or two licks in the face and rolled him in the creek, and said he would never bother anybody else, but would make food for the fish. He put the clothing in the trunk and put the trunk in the hack and carried the trunk back to Stonestreet's house, and put it in the basement. He took the hack back to the livery stable. The man in charge of the stable said he owed $1 extra for keeping the hack overtime. He came back to Stonestreet's house and went to bed. He saw some blood on his pants the next morning and thought he would wash them, and then decided to burn them. He took the axe and trunk and set fire to the trunk, but the clothes were wet and he was afraid the people would see too much smoke in the basement. He took the rest of the trunk and clothing and buried them; said after the body was found and placed in the morgue he went down to see it, and went back and Stonestreet asked him how it looked, and he told him he did not believe anybody would ever be able to recognize it. "Christy told me he left here some time in September, got back to Grand Saline on the same day of the month that he left there in July. The axe was shown Christy at the jail."

There was evidence as to the finding of the axe, pieces of the trunk, and the clothing that Christy wore on the day of the homicide, in the basement of the Stonestreet house. There was also evidence from the keepers of the livery stables that Christy got the buggy and the hack on the days mentioned by Christy in his statement, and kept them during the time stated by Christy. Of special interest is the fact that it

appears from the testimony of the keeper of the livery stable that Christy got the hack on the morning of 18 August and did not return it until 11 o'clock that night.

A woman named Lummy Davis testified that she was in jail with Mrs. Warren and was put in the hall used by Mrs. Warren. That one day she asked Mrs. Warren, "How come you all to kill Warren?" Mrs. Warren answered, "I knew what was best for me, and who was doing for me." Lummy Davis: "You did not have any business doing that." Mrs. Warren: "I did not want to leave him behind." This witness further testified that she overheard a conversation between Mrs. Warren and Christy; that she heard Mrs. Warren say: "You go on the stand and swear first, and we will take particular notice of what you swear and will swear the same thing. You go on the stand and swear you killed him in self-defense. You swear he took his gun out of his pocket and you picked up a rock and hit him in the head and killed him." This witness further testified that Mrs. Warren (780) told her that Warren's body was placed in her trunk, carried out from her house at 10 o'clock in the morning so that people will not suspicion anything, but would think that it was boarders going from the house, as boarders went out all the time.

The foregoing is a synopsis of the testimony for the State.

The defendant Ida Ball Warren went on the stand and testified in her own behalf as follows:

"I am 36 years old; born out towards Clemmonsville, 9 miles from here; was 25 years old when I left the county. Went first to Lynchburg; lived there two years; then to Texas; came back here after being in Texas; stayed about a week in the settlement of my father's estate; lived in Grand Saline, Texas, not quite two years. During the time I lived in Grand Saline, Texas, and Lynchburg, Christy and myself lived together as man and wife. Left Grand Saline, Texas, in December, 1912; arrived here about the 9th of December and was married to Mr. Warren. We first lived on East Fourteenth Street until March a year ago; we then came to the Piedmont House; I was employed to run it by Mr. Call until March, 1915; from that time I ran it in my own name. My daughter Pearl married Clifford Stonestreet when she was 15; she is now 16 years old; they lived a while on West Thirteenth Street, then on East Fourteenth Street; then went to live on West Sixth Street with her husband, and was living there on 18 August, 1914. Her child was born 28 September, 1914. I never saw Christy after I left him at Grand Saline, Texas, in December, 1912, until January, 1914. I lived then on East Fourteenth Street. To my knowledge he remained in Winston-Salem only one night; came one evening, left next day; next time I saw him was July, 1914. I was then employed by

Mr. Call to run the Piedmont boarding-house. Christy came there one night about 11:30 o'clock; stayed all night at the hotel. Mr. Warren did not know he stayed there. Next morning he went to my daughter's, Mrs. Stonestreet, and boarded there. I saw him while he was boarding with her. I was out at my daughter's house during the month of August, 1914; my daughter was not well. I went there probably twice a week. She was expecting to be confined. On the night of 17 August Christy came to the hotel about 11:30 o'clock; stayed in room 14. I told my daughter any time she felt like she did not want him at her house she could send him down and let him stay at the hotel. Mr. Warren did not know of this arrangement. Mr. Warren and myself slept in room 9, in the rear of sitting-room at the head of stairs. This was my bedroom. I got up on the morning of the 18th about 4:30 or 5 o'clock; first went to the kitchen; then went to wake up Christy in room 14. While in there Mr. Warren came in the door through the sitting-room.

(781) He saw us together, and said: 'What are you doing here, you son of a bitch? I am going to kill you,' and he rushed over there with his hand like he was going to pull his gun out. Christy jumped up and grabbed him by the arm, and they scuffled around, and in the scuffle I ran out of the room. I went away through the back hall door. Christy came to me afterwards in the dining-room and said he had had a terrible fight in there and was afraid he had hit Warren hard enough to kill him. Said he did not know what to do. I was scared so bad I could not speak. I did not tell him what to do. I did not know. I did not go back in the room where I left them fighting. Don't know what he hit him with, but I think with a monkey wrench. He did not tell me he hit him with a wrench. Christy said he did not know what to do; it was going to cause him lots of trouble, and me too, and I did not know what to do, I was scared so bad. He said he was going to put the body in a trunk and did not know what to do with it, but he was going to do something with it. I never saw Mr. Warren after he was dead. I saw a colored man and Mr. Christy take the trunk down to the sidewalk, load it in the hack; I was standing in the sitting-room at the window, which was open, and fronts on the street. I never saw Christy after that until the next day. Stonestreet was not at the hotel the night of 17 August. He ate his dinner and supper there every day; was working for Mr. Call. I saw the chief of police and showed him the letters he testifies about. I never had any conversation with my sister, Mrs. Henning, about this matter. She told me one day when we were going from the hospital along the street that it was talked about Mr. Warren being gone; then she said that Lula, her son's wife, said she did not doubt much that being Mr. Warren who was found in the creek. I said I did not know, and said it was an awful burden to accuse me of doing such a thing. I

did not tell her I planned the murder. I have been in jail since April. Ethel Ward and Lummie Davis have been in jail with me. I heard Lummie Davis testify to a conversation she heard me and Christy have in jail. I had no such conversation with Christy, nor did I holler across to Christy to swear that he fought in self-defense and that the other witnesses would come along and testify accordingly. I never had any conversation with Christy in the presence of Lummie Davis, nor have I had any conversation with him since I have been in jail. I did not have any buggy whip in the Piedmont boarding-house where I lived. I did not advance Stonestreet the money to pay Christy for the hack or cost of the buggy. I know nothing about the buggy ever having been carried to Stonestreet's house. I never had in my possession or attempted to use any chloroform. Mr. Call gave me a bottle of wine, but I did not put quicksilver in the wine and offer it to Mr. Warren. I never attempted to poison him by putting something in his soup; I never tried to give him chloroform, and I never tried to get Christy or any one else to shoot him while he was at work at the tower. Warren had a pistol. Christy took it with him when he left. (782) Last time I saw the pistol it was lying on the mantel board in room No. 9. I thought Warren was asleep, and left him in bedroom No. 9 on the morning of the homicide. I never wrote Christy any letters asking him to come back and kill Warren. I do not know of my knowledge that Christy came here in 1912. I did not see him. I had nothing to do with the disposition of the body of my husband; have not been to Muddy Creek since I left home a number of years ago. I did not go to the morgue to examine the corpse. I took no part in the murder of my husband and know nothing of it except what I have said here, and what I said to the officers. I was never married to Christy. I had one child before I met Christy, the wife of Clifford Stonestreet; she was 7 years old when we went to Lynchburg to live; she thought Christy was her father until this trouble. I had so told her and never told her any better. I have never been in court before. I never entered into any combination and conspiracy in going out to Stonestreet's house to kill Warren. I was not there on the 8th of August, when it was alleged the buggy was left there. I heard about them going to drive that morning; that was the first time I ever heard of it. I gave Mr. Warren's watch to Stonestreet about a week or two weeks after the homicide. I did not tell him Warren had been killed, and to my knowledge he did not know it."

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

Fred. M. Parish and Gilmer Korner, Jr., for Christy.

Jones & Clement for Warren.

CLARK, C. J. There were seventy exceptions taken, but in their briefs the counsel for Christy group their exceptions under eight heads and the counsel for Warren group theirs under seventeen heads.

The court permitted the solicitor to ask certain jurors whether or not they belonged to the Society of Friends without challenging them for cause. The object of the inquiry was to ascertain whether or not the jurors had conscientious objecions to capital punishment. The prisoners except because this was not treated as a challenge for cause. It has always been very questionable practice whether when the State asked questions for information on which to base the challenge for cause the defendant could "admit the cause." One of the objections to the refusal to the State of the right to appeal is because this and other practices could not be brought up on exception by the State. Under this practice the solicitor dare not ask a single question to give him information about a juror lest the juror be summarily set aside. This was one of the methods in addition to the great disparity in the number of peremptory challenges (23 to 24) which practically placed the selection of the
(783) jury in the hands of the counsel for the prisoner. Now, however, section 6, chapter 31, Laws 1913, has put an end to this practice and warranted the action of the judge.

Another exception is to the admission of a letter purporting to have been written by the deceased to Ida Ball Warren on 22 October, 1914. While the contents of the letter were immaterial to the issue, its admission was competent to show that she had in her possession a letter which she claimed was from her husband when she knew at the time he had been dead for several months. It tended to show that she had sent out letters ostensibly to locate her husband when at the time she wrote them she knew he was dead.

The prisoners except that the court did not warn the jury that any statement made by one of the prisoners not in the presence of the others could not be considered except against the one making it, and was no evidence against the others. It is not necessary in this case to recall the rule of practice set out by this Court, 164 N. C., 548: "It will not be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of the admission that its purpose shall be restricted," for the record shows that the judge, on the admission of the evidence, and again in the charge, called the attention of the jury to the fact that the admission or statements of one of the prisoners was competent only against the party making it and should not be considered as against the others.

The counsel for the defense strenuously insist that declarations made by the prisoners while in custody or in jail are incompetent, though the court found upon evidence that they were made voluntarily and without

any inducement of hope or fear. This Court has repeatedly held that such statements are competent. *S. v. Drakeford,* 162 N. C., 667, and cases cited.

It is also well settled that whether a statement is voluntary is a preliminary question of fact, and that the finding of the judge cannot be reviewed if there is any evidence to sustain it. *S. v. Page,* 127 N. C., 512. A confession is deemed to be voluntary unless the party against whom it is offered shows facts to the contrary. *S. v. Sanders,* 84 N. C., 728. This rule is also followed in Massachusetts, Missouri, New Jersey, New York, Ohio, South Carolina, and Texas, and some other States, though in some States the presumption is that confessions are involuntary and the State must offer evidence to the contrary. But in all the States when the court finds the fact that the confessions were voluntary this is conclusive if there is evidence to sustain it.

The prisoner Christy objected to a statement made by him, but the evidence as set out warrants the finding of the court, if we could review it, that the statement was voluntary. It was made on the train while Christy was being brought back from Texas under extradition papers. The officer had showed Christy the Winston papers giv- (784) ing information in regard to the case and, among other things, a confession by Ida Ball Warren, and told Christy that he believed he had followed her and her husband from Texas; that he did not believe that one man could have committed the crime. Christy afterwards asked if anything he said would be taken against him, and the officer replied that it would if it had any bearing on the case. He then said: "I know all about it and they know all about it. I am going to tell the whole thing." He said, "We are all in it." The officer testified that he did not carry him these papers in order to get Christy to tell, but in order for him to see what was being said in Winston without himself having to tell Christy.

We see in this no hope or threat held out by the officer, but, on the contrary, he warned Christy that anything he said bearing on the case would be used against him. Doubtless Christy told what he knew to rebut the statement made by Ida Ball Warren in the paper, because he deemed it unfair to himself, and did not wish to let it stand uncontradicted. There was no impropriety in letting the prisoner see the papers; indeed, this would have been a positive benefit to him in preparing his defense to meet the charges therein made, if untrue.

The prisoners also earnestly press the exception that there was not sufficient evidence to go to the jury that the prisoners had entered into a conspiracy to kill the deceased. The statement by Christy, if believed by the jury, is sufficient to sustain the verdict against him. He states that for years he had lived in illicit relations with his codefendant;

that she deserted him in Texas and ran away with the deceased; that he made three trips from Texas to North Carolina to see her; that she received him in her house at intervals and sent him to her daughter's house, where she frequently met him; that they both tried to keep her husband, Warren, in ignorance of the fact that Christy was in Winston; that she repeatedly tried to get him to shoot her husband, and that she and Christy and Stonestreet planned to kill Warren at Stonestreet's house one Saturday, and that, when this miscarried, Warren's wife next proposed that she would chloroform her husband and then Christy and Stonestreet could choke him to death. There was a cord around the neck when the corpse was found. Christy further said that he furnished the chloroform for that purpose, and thereafter they told him that Warren was dead, and he put the body in a trunk, hauled it around Winston all day long, and at night endeavored to sink the body in the waters of Muddy Creek. These facts were not only sufficient to show conspiracy, but if believed admit of no other conclusion.

As to the prisoner Ida Ball Warren, there was also evidence to sustain the charge that she was a party to the conspiracy to put her husband to death. For years she had lived with Christy as his paramour, till she deserted him, and, coming to North Carolina with Warren,
(785) married him. A year thereafter Christy came to Winston without the knowledge of Warren. He was brought to her room and was sent away by her before day before her husband awaked. Christy was sent by her to the home of her illegitimate daughter, where the prisoner Warren often met him. On the night of the homicide Christy went to her home, stayed there all night, and the next morning between 5 and 6 Warren was killed. She made no outcry, though testified that she knew the deed was being done. She furnished her trunk in which to put the body, and coolly saw it "dumped down" the steps with the body of her husband doubled up in it. When the officer came to inquire about her husband, months afterwards, she told him he had gone to the bedside of his sick mother, and showed him a letter purporting to have been written by her husband months after he was dead. When arrested she stated that Christy came in and told her he had choked her husband to death, and in jail she told Christy, according to the evidence, to swear that he had killed Warren in self-defense, and when Christy refused to go on the stand, she did so herself and swore it. Upon the evidence she seems to have been the moving spirit in the murder, the veritable Lady Macbeth of the tragedy. Her sister, Mrs. Henning, testified that Mrs. Warren said to her, "I planned that murder."

Upon the record the husband of the prisoner, Warren, was put to death by his wife and her paramour by a preconcerted, predetermined

murder, cold blooded and relentless, without any mitigating or extenuating circumstances.

We find no error in the conduct of the case by the learned judge, and the twelve jurors have found their verdict upon competent evidence which justified their conclusion.

No error.

Cited: S. v. Rodman,, 188 N. C. 724 (4f); *S. v. Grier,* 203 N. C. 589 (4g); *S. v. Moore,* 210 N. C. 692 (4f); *S. v Caldwell,* 212 N. C. 489 (4g); *S. v. Richardson,* 216 N. C. 305 (4g); *S. v. Smith,* 221 N C. 407 (4f); *S. v. Biggs,* 224 N. C. 26 (4l).

STATE v. PORTER CRISP.

(Filed 12 January, 1916.)

1. Homicide—Self-defense—Assault Provoked—Quitting the Combat.

One who has entered willingly into a fight in the sense of its being voluntary and without legal excuse, or who has wrongfully used language calculated or intended to provoke the difficulty which presently ensued, may not maintain the position of perfect self-defense for the killing of another, unless at a time prior to the killing he had quitted the combat within the meaning of the law. *S. v. Kennedy,* 169 N. C., 334, cited and applied.

2. Homicide—Assault Provoked—Abusive Language—Test.

A test of the right of perfect self-defense is whether, if the homicide had not occurred, the defendant would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which he has provoked or entered into the fight. Such instances mentioned and discussed by HOKE, J.

3. Homicide—Assault Provoked—Self-defense—Abusive Language—Fighting Willingly.

Where the defendant on trial for a homicide has used language calculated to provoke a breach of the peace, and at the commencement of the difficulty with the deceased had made hostile and threatening demonstration with a weapon, which he had taken from his pocket and kept for convenient use during the ensuing dispute, and thereafter the deceased sprang to possess the weapon, which fired twice during the scuffle, the second shot inflicting the mortal wound, the plea of a perfect self-defense may not be sustained, it appearing that the prisoner entered the fight willingly and continued willingly therein.

4. Homicide—Self-defense—Abusive Language—Assault Provoked—Trials —Questions for Jury.

Where the plea of a perfect self-defense is interposed by a defendant on trial for a homicide, and it appears that he had used violent and insulting language to the deceased immediately preceding an assault upon him, the question as to whether the language used was calculated or intended to bring on the assault, under the surrounding circumstances, is generally one for the jury.

(786) APPEAL by defendant from *Webb, J.*, at July Term, 1915, of SWAIN.

Indictment for murder. Before entering on the trial the solicitor announced that he would not ask for a verdict of murder in the first degree, and the issue was submitted on the question of murder in the second degree or manslaughter or excusable homicide.

There was evidence tending to show that, in September, 1913, at Hazel Creek in Swain County, the prisoner, deceased, and four others were engaged in a game of draw poker, the prisoner having his pistol in evidence, lying near him; that an altercation having arisen between prisoner and deceased, the prisoner applied insulting words to the deceased, picked up his pistol, made a hostile demonstration with it, and then laid it back, and immediately, according to State's testimony, and after some two or three minutes, according to prisoner's statement, the deceased made a grab at the prisoner or the pistol and in the struggle over it the prisoner shot the deceased and killed him.

Speaking more in detail, Weaver Hurst, a witness for the State, testified in part as follows: "That the defendant Crisp, Arnold, Dalton, John Postell, Harley Gregory, and the deceased were playing poker on Sunday, the day the deceased was killed; at the time the trouble arose Crisp was dealer and Buchanan opened the pot. Dalton passed, Postell stayed, and Harley Gregory passed, and Crisp raised 50 cents. Buchanan looked over and asked Postell if he was going to call Crisp. He says, 'If you do not, I will.' Crisp said, 'You passed, didn't you?' talking to Buchanan. Buchanan said, 'I will leave it to the boys.' Crisp at this time had his pistol in his hand and laid it on the ground. Buchanan sat and looked Crisp right in the face; about that time he sprang at him, or the pistol. When he did that they went together.

They came up about half-straight and the pistol fired. When the
(787) gun fired witness ran off. When Crisp and the deceased had scuffled down the hill about 15 or 20 feet the witness went away and did not see any more. This occurred about 4 o'clock Sunday afternoon. The parties had been playing cards for four or five hours. The pistol had been lying on the ground by the side of Crisp and was Crisp's pistol. When Crisp said to Buchanan, 'You passed,' it was then he

picked up the pistol. He put the pistol up next to Buchanan's face and said, 'Damn you, you passed,' and later laid the pistol down. It was at this time Buchanan looked at Crisp and sprang at the pistol. There were two shots fired in all. The first shot went into the ground and the second one was the one which killed Buchanan. Buchanan was kinder over Crisp when the first shot was fired. Buchanan after he was shot lived eight or ten minutes. The next time witness saw him he was dead. Witness, when the trouble began, left and went into the camp. The deceased was shot about 1 inch under the heart, on the left side. Buchanan did not have a pistol that day. Witness could not tell that Buchanan had been drinking any, but defendant seemed to be drinking."

Harley Gregory, another witness for the State, testified in part as follows: "We were sitting there playing poker, and Porter Crisp was dealing the cards. He dealt the cards and Tom Buchanan broke the pot for 10 cents. It passed on around to some of the other boys and back to Crisp, and he said, 'It will take 50 cents to see mine.' Buchanan looked over at one of the other boys and said, 'What are you going to do? If you don't call him, I will,' and he, Buchanan, threw his cards in and also threw in 40 cents. When he did this Crisp presented his gun at him and said, 'God damn you, you passed, didn't you?" and Buchanan said, 'I will leave to the boys.' Crisp reached down and threw him his money and said, 'You passed. Take it like a little man and not like a little dog.' Buchanan looked at him and then made a grab for the gun. When he did that they raised about straight and the first shot was fired and they scuffled some few steps down the hill, then the second shot fired, and he called for some of the boys to come and help him, and they came back and he went in. Postell came in on the other side and took the gun out of their hands. I could not see whose hands he took it out of. Buchanan fell back in my arms and I laid him down on the ground. I was right behind Buchanan with my arms around him. The boys were bent over and I could not see who had the gun. I suppose the gun had been there ever since the game started. Crisp brought it, and I do not remember whether he laid it on the ground at the start, but it was lying there when the trouble occurred. After he made these statements and presented the gun in the direction of Buchanan he dropped the gun down across his thigh in the direction where Buchanan was sitting. I could not tell that Buchanan was drinking any, but Crisp seemed to be drinking some." The witness further said, in part: "He heard Tom Buchanan say, 'Don't let (788) him kill me,' and heard Crisp say, 'Damn you, I don't want to kill you, but if you don't turn me loose, I will.'"

Harvey Gregory, in his examination in chief, testified in part: "That he was sitting off about fifteen steps when he first knew of it. Porter

Crisp had presented his gun in the direction of Buchanan and said, 'Damn you, you passed.' Buchanan said, 'I will leave it to the boys.' Witness further testified that he could not see what they did with the gun. He was below. The next he knew he saw Buchanan make a spring down the hill. I supposed he grabbed at the gun in his arms or something, and they got about half-straight and the first shot fired. They backed off about eight steps and the second shot fired. I ran about fifty yards. Harley was up above, and he called for some of us boys to come and help him, and we went back. About the time we got back Postell and Harley went in. Postell got the gun and Buchanan fell back in Harley's arms and he laid him on the ground. Postell ran off. Crisp ran away."

The prisoner, testifying in his own behalf, said that he took the pistol with him, not for any purpose, but just like "a boy will," and the weapon incommoding him, he took it out of his pocket and laid it on the ground beside him; that at the precise time of the occurrence Buchanan had thrown down his hand, which indicated that he no longer had a right to participate in that bet, and then, when he undertook to do so, witness told him that he had no right to do so, whereupon deceased called witness a liar. Witness told him not to do that, he was telling the truth, and at the same time picked up the pistol and put it across his knees; that Buchanan was a larger man and looked right wild, was the reason witness picked up his pistol; that witness threw Buchanan his money, laid down the pistol, and thought the matter was settled, and picked up the cards and started to shuffle, and, three or four minutes later, probably longer, Buchanan "jumped at witness and grabbed," and both got the gun about the same time; that witness was not trying to shoot deceased, but to get the gun away from him, and in the scuffle it went off and killed him; that at no time during the struggle did witness try to shoot deceased, and didn't intend to do so. Witness told deceased several times to turn the gun loose, that he did not wish to shoot him, etc.

The court, in an elaborate and comprehensive charge, referred to the entire testimony, stating the positions of the State and the prisoner, instructed them as to the law, distinguishing manslaughter from murder, as applied to this evidence, and, among other things, directed the jury, as shown in the excerpts from the charge as indicated in the prisoner's exceptions and assignments of error, as follows:

"Gentlemen of the jury, the law says that a man cannot bring on a difficulty and then invoke the doctrine of self-defense. The law
(789) does not permit a man to do that. The law says if a man enters a fight willingly, if he is willing to fight before the fight begins, and if he takes the life of another, the law says he is guilty of murder in the

second degree or manslaughter, as the jury may find from the evidence and the law as given them by the court. . . .

"The court charges you, if you find beyond a reasonable doubt that the defendant entered into the fight willingly before the fight began, and after getting into it, and at the time he went into it, that it was his purpose to kill the deceased; if he had made up his mind to kill the deceased, though he had not premeditated it—if you find those facts, it would be your duty to find the defendant guilty of murder in the second degree. . . .

"And if you find beyond a reasonable doubt that he entered into the fight willingly, that he was willing to enter into a combat, that is, before the combat began, and find that after he entered it he shot and killed the deceased, but that it was not his purpose to do so, he had not made up his mind to do so, but find that he did shoot and kill him, that would be manslaughter, and it would be your duty to convict him of manslaughter. . . .

"Or if you find beyond a reasonable doubt that the defendant entered the fight willingly, that he was willing to fight the deceased, and entered into it willingly just as the fight began or before the fight began, and find that he did not intend to kill the deceased, it was not his purpose to kill him, had not made up his mind to kill him, but if you find that he entered into the fight willingly, and they got into an altercation and used that pistol, one trying to get it from the other and the other trying to get it, and he was willing to fight on his part, and it went off while so fighting and killed the deceased, the court charges you that the defendant would be guilty of manslaughter, and it would be your duty to so find. . . .

"Or if the State has satisfied you beyond a reasonable doubt that the defendant used language, just before the fight began, towards the deceased that was calculated and intended to bring on the difficulty, and if you find that after the language was used, if you find beyond a reasonable doubt that the defendant did use language calculated and intended to bring on the difficulty, and if you find that after that language was used, if you find beyond a reasonable doubt that the defendant did use language calculated to bring on the fight, and the fight ensued, and if you find that they got into this altercation, and, trying to get the pistol, the defendant shot and killed the deceased, the court charges you that it would be manslaughter, and it would be your duty so to find. Or if you find that the defendant used language calculated and intended to bring on the fight, and they got into this altercation, and you find that they were struggling over the pistol and the pistol fired in the hands of either one of them and killed the deceased, the court (790)

charges you that the defendant would be guilty of manslaughter, and it would be your duty so to find. . . .

"So, gentlemen, it is important for you to find as to what occurred. Did this defendant curse the deceased? Did he use the language that one of the witnesses testified to, 'Take it like a man and not like a little dog'; and did he say 'You passed, God damn you'? Has the State satisfied you beyond a reasonable doubt that the defendant used that language towards the deceased? And has the State satisfied you that that language was calculated and intended to bring on a fight? If the State has so satisfied you beyond a reasonable doubt that he used that language towards the defendant, and that such language was calculated and intended to bring on the fight, the court charges you that this defendant is guilty of murder in the second degree, or manslaughter, as you may find under the instruction of the court."

To this portion of his Honor's charge defendant excepted.

The jury convicted prisoner of manslaughter, and from judgment on the verdict prisoner appealed.

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

Bryson & Black and J. N. Moody for defendant.

HOKE, J., after stating the case: It is insisted chiefly for the prisoner that his Honor's charge, in effect, denied him the right to a perfect self-defense, if the jury should find that he entered into the fight willingly or used language calculated and intended to provoke the difficulty which presently ensued, the objection being that, under our authorities, his Honor should have added "unlawfully" to this feature of his charge. While this may be correct as a general proposition, we are of opinion that it does not arise to defendant on this record.

It is the established position with us that a defendant, prosecuted for homicide in a difficulty which he has himself wrongfully provoked, may not maintain the position of perfect self-defense unless, at a time prior to the killing, he had quitted the combat within the meaning of the law as declared and approved in the recent case of *S. v. Kennedy,* 169 N. C., p. 326, and other like cases. In some of the decisions on the subject it has been stated as a very satisfactory test that this right of perfect self-defense will be denied in cases where, if a homicide had not occurred, a defendant would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which he had provoked or entered into a fight. Under our decisions such a position would exist:

a. Whenever one has wrongfully assaulted another or committed a battery upon him.

b. When one has provoked a present difficulty by language or (791) conduct towards another that is calculated and intended to bring it about. *S. v. Shields,* 110 N. C., 497; *S. v. Fanning,* 94 N. C., 940; *S. v. Perry,* 50 N. C., 9. And, in this connection, it is properly held that language may have varying significance from difference of time and circumstances, and the question is very generally for the determination of the jury. *S. v. Rowe,* 155 N. C., 436.

c. Where one had wrongfully committed an affray, an unlawful and mutual fighting together in a public place, the more recent ruling being to the effect that the "public place," formerly considered an essential, need be no longer specified or proved. *S. v. Griffin,* 125 N. C., 692.

And when there is relevant testimony, it has come to be considered the correct and sufficient definition of an unlawful affray or breach of the peace when one has "entered into a fight willingly" in the sense of voluntarily and without lawful excuse. *S. v. Harrell,* 107 N. C., 944.

Extending and applying these principles to prosecutions for homicide, it has been repeatedly held in this State that where this element of guilt is present, and one has slain another under the circumstances indicated, the offender may not successfully maintain the position of perfect self-defense unless he is able to show, as stated, that at a time prior to the killing he quitted the combat and signified such fact to his adversary.

In the present case his Honor, in effect, charged the jury that if testimony of defendant was believed, they would acquit him. The jury, therefore, having received and acted on the State's evidence as presenting the true version of the occurrence, and, in the light of this testimony and the principles of law heretofore stated, his Honor was clearly justified in charging the jury as he did that if the defendant entered into the fight willingly or used language calculated and intended to bring it on, he could not maintain perfect self-defense unless he satisfied the jury that he had quitted the combat, etc., the State's evidence tending to show that the defendant, with his pistol continuously in evidence, had used language towards deceased that, under the circumstances, was well calculated to provoke a breach of the peace, and further, that at the commencement of the difficulty he had made a hostile and threatening demonstration with the weapon.

There are decisions on the subject in other States and by courts of high repute that are not in full agreement with the position as it obtains with us, some of them being to the effect, as we interpret them, that mere language, however insulting, may never be held to deprive a man of his right of self-defense. In some of these cases, however, as pointed out in *S. v. Kennedy, supra,* the defendant had been convicted of the capital offense of murder, and the Court, in discussing whether such a conviction should be upheld, were not called on to be particularly advertent to

the distinction between perfect self-defense, where a defendant is
(792) excused altogether, and imperfect, where the capital offense may be reduced to a lesser degree of the crime. In others the language ordinarily regarded as insulting was used in jest or under circumstances where it could not properly be said to have provoked the difficulty within the meaning of the law. But those cases which hold, as some of them seem to hold, that language, however insulting, may not under any circumstances deprive a man of his right of a perfect self-defense in a fight which his own wrongful words have provoked, do not, in our opinion, afford a safe or sound rule by which to weigh and adjust the significance of human conduct, and the position, as it obtains in this State, is grounded on the better reason and is well sustained by authority. *S. v. Kennedy, supra; S. v. Robertson,* 166 N. C., 356; *S. v. Yates,* 155 N. C., 450; *S. v. Turnage,* 138 N. C., 566; *S. v. Garland,* 138 N. C., 675; *S. v. Brittain,* 89 N. C., 481; *S. v. Zorn,* 202 Mo., 12; *People v. Filippellé,* 173 N. Y., 509; *Reid v. State,* 11 Texas App., 509; *Adams v. The People,* 47 Ill., 376.

In *Yates' case, supra,* it was held: "It is the duty of one who is assaulted to abandon the difficulty and avoid the necessity of killing, if he can do so with reasonable safety; and one who enters into a fight willingly and does not abandon it, but prefers to stand his ground and continue in the fight, is guilty of manslaughter at least, if he kills."

In *Reed v. State, supra, White, C. J.,* delivering the opinion, states the correct doctrine as follows: "But the right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law, regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then, indeed, the law wisely imputes to him his own wrong, and its consequences to the extent that

they may and should be considered in determining the grade of offense, which but for such acts would never have been occasioned."

And in *People v. Phillipellé, Cullen, J.*, after quoting with ap- (793) proval from *Reed v. State* and *Adams v. State,* concludes as follows: "Tersely stated, it is that, if one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter."

We were referred by counsel to *S. v. Baldwin,* 155 N. C., 494, and *S. v. Pollard,* 168 N. C., pp. 116-119, as authorities against the validity of the present conviction; but, on the facts in evidence as received by the jury, neither case supports the defendant's position. In *Baldwin's case,* on evidence tending to show that defendant was wrongfully assaulted by deceased with a display of deadly weapons, threatening serious bodily harm, the court charged the jury: "That if the prisoner fought willingly at any time up to the fatal moment, it would be the duty of the jury to convict of manslaughter." And a new trial was awarded because the charge, as expressed, ignored the evidence tending to show that the deceased was the aggressor and required a conviction if the prisoner at any time fought willingly, though it might have been "rightfully and in his necessary self-defense." And in *Pollard's case,* although an instruction which was disapproved contained the expression, "if defendant was willing to enter into a fight with deceased with a deadly weapon he would be guilty of manslaughter," this was on evidence in behalf of defendant tending to show that deceased was a violent and dangerous man; that he had made threats against the life of the defendant and, shortly thereafter, came to defendant's place of business, cursed him, and made a demonstration as if to draw his pistol, when defendant fired and killed him, and the Court held that the entire instruction had so confused the general definition of manslaughter with the right of self-defense, arising to defendant on the evidence, as to create the necessary impression on the jury that defendant would be guilty if he was willing to fight, though he might have done so rightfully and in his necessary self-defense, thus making the charge conflict with the principles of *Baldwin's case.* Neither decision is applicable to the facts as presented in this record, where, on the testimony as received by the jury, the defendant, under a correct charge, has been found to be the aggressor and to have wrongfully provoked the fight in which the deceased was slain.

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

Cited: S. v. Wentz, 176 N. C. 750 (1f); *S. v. Evans,* 177 N. C. 571 (1f, 3g); *S. v. Coble,* 177 N. C. 592 (1f); *S. v. Finch,* 177 N. C. 602 (1f); *S. v. Baldwin,* 184 N. C. 791, 792, 793 (1f); *S v. Bost,* 192 N. C. 3 (1b); *S. v. Strickland,* 192 N. C. 256 (1f); *S. v. Hardee,* 192 N. C. 536 (1f); *S. v. Evans,* 194 N. C. 124 (1f); *S. v. Parker,* 198 N. C. 634 (1f); *S. v. Bryson,* 203 N. C. 730 (1f); *S. v. Robinson,* 213 N. C. 280, 281 (4g); *S. v. Hightower,* 226 N. C. 65 (4b); *S. v. DeMai,* 227 N. C. 664 (1f); *S. v. Correll,* 228 N. C. 30 (1f); *S. v. Randolph,* 228 N. C. 232 (1f).

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STATE v. GEORGE CATHEY.

(Filed 12 January, 1916.)

1. Intoxicating Liquors—"Search and Seizure"—Constitutional Law.

Chapter 44, Laws 1913, known as the Search and Seizure Law, is constitutional and valid.

2. Criminal Law—Evidence—General Reputation—Intoxicating Liquors—Search and Seizure.

On cross-examination a character witness may be asked the general reputation of a party to the action as to particular matters, and as to a particular trait, but not of particular acts; and where the defendant is being tried for the violation of our prohibition law, under the Search and Seizure Act, it is competent, on cross-examination, for the solicitor to ask the witness as to defendant's reputation in dealing in liquor.

3. Trials—Instructions—Contentions—Appeal and Error.

Where the guilt or innocence of a defendant charged with violating our prohibition law is properly submitted to the jury as a matter of fact to be found by them, under a charge free from error, exception that the court did not fairly state the defendant's contention will not be sustained on appeal.

4. Criminal Law—Intoxicating Liquors — Sentences — Alternative Judgment.

Where one has been previously convicted of violating our prohibition law, and the case is on appeal to the Supreme Court, and upon a second conviction the court sentences him so as not to take effect concurrently with the sentence pronounced and appealed from, but, should the former sentence be set aside, the present sentence to take effect immediately: *Held,* the sentence imposed was not objectionable as being alternate or conditional, and its terms are such as the law would otherwise have written into it.

STATE *v.* CATHEY.

APPEAL by defendant from *Long, J.*, at September Term, 1915, of BUNCOMBE.

The defendant was indicted under the Search and Seizure Law, ch. 44, Laws 1913, for having in his possession for the purpose of sale, malt, vinous, and spirituous liquors.

E. M. Mitchell, sheriff, testified that the search and seizure warrant was regularly issued, and that, acting thereunder, he searched the premises of the defendant and found at the defendant's house about two-thirds of a barrel of beer, about twenty-four bottles of champagne, and something like twenty-five yards away, at a little house east of Cathey's dwelling-house, he found three-quarters of a barrel of rye whiskey and three-quarters of a case of corn whiskey, three-quarters of a barrel of pints—must have been seventy-five or eighty pints in the barrel; and in a little building, something like a barn, found a hundred and twenty barrels of beer, "ten dozen bottles" printed on the barrels; the barrels were something like sugar barrels; that he hauled these liquors, the next night, to the jail, and that they were all there, except three-quarters of rye and the case of corn liquor "got away from us."

This witness testified on cross-examination by the defendant as (795) follows: "Do you know George Cathey's general character? A. I think I do. Q. What is it? A. I think it is good except that Mr. Cathey will drink"; and on redirect examination by the State: "What did you say Cathey's character was? A. I think it is good except that he will drink some. Q. Sheriff, I will ask you if he isn't the most notorious liquor seller in Buncombe County?" Objection by the defendant. Objection sustained. "I will ask you, sheriff, if Mr. Cathey's general character isn't bad for fighting?" Objection by the defendant. Objection sustained. "Sheriff, do you know Mr. Cathey's general reputation in regard to dealing in liquor?" Objection by the defendant. Objection overruled, and the defendant excepts. "A. Yes, sir. Q. What is it? A. It is bad; he has been accused of selling it."

There was a verdict of guilty, and his Honor pronounced the following judgment thereon:

"Upon coming in of the verdict in this case, the court is informed by the solicitor that this defendant was convicted at the May term of this court, before *Judge Webb,* for retailing, and was sentenced to twelve months in jail and assigned to work on the public roads of Buncombe County, and that the defendant appealed from this judgment to the Supreme Court, and that said appeal has not yet been determined, and that Judge Webb still has the papers in that case for settlement of case on appeal. In order that there may be no conflict as to the sentences in these two cases, the sentence in this is not to take effect concurrent or in conflict with the sentence of Judge Webb. If, for cause, Judge

Webb's sentence is set aside, then this sentence is to be effective immediately. If sentence is confirmed, then the sentence rendered by this Court is to take effect at the expiration of Judge Webb's sentence of twelve months. Wherefore, it is considered and adjudged by the court that the defendant in this case be imprisoned in the county jail of Buncombe County for a period of sixteen months so as not to come in conflict with Judge Webb's sentence as aforesaid, and that he be assigned to work on the public roads of said county."

The defendant appealed, and the exceptions relied on in the brief are (1) that the Search and Seizure Law is unconstitutional; (2) that it was error to permit the sheriff to testify on redirect examination that the general reputation of the defendant was bad for dealing in liquor; (3) that his Honor did not fairly present the contentions of the defendant to the jury; (4) that the judgment pronounced is erroneous in that it is in the alternative and conditional.

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

Jones & Williams and Douglass & Douglass for defendant.

(796) ALLEN, J. The Search and Seizure Law has been declared constitutional in several decisions of this Court, and it is not necessary to further discuss the question. *S. v. Wilkerson,* 164 N. C., 431; *S. v. Denton,* 164 N. C., 531; *S. v. Moore,* 166 N. C., 284.

It will be observed from the statement of the case that the defendant did not reserve an exception to the evidence of the sheriff when he stated that the general reputation of the defendant was bad for dealing in liquor, and that the exception stated in the record is only to his statement that he knew what his character was; but giving the defendant the benefit of the objection, it cannot be sustained. *S. v. Holly,* 155 N. C., 485; *S. v. Wilson,* 158 N. C., 599.

In the first of these cases it is stated that a character witness may be asked on cross-examination if there was not a general reputation as to particular matters, and in the second that the rule allows a cross-examination as to reputation of a particular trait but not of particular acts.

We have carefully examined the charge of his Honor, and do not find that it is the subject of criticism.

Necessarily, he consumed more time in the statement of the contentions for the State than of those for the defendant, as no evidence was introduced in behalf of the defendant; but the question of the guilt or innocence of the defendant was left to the jury as an issue of fact under a fair and accurate charge. The objection to the form of the judgment must be sustained if it is in the alternative and conditional, as a judg-

ment at law must be yea or nay. (*S. v. Bennett*, 20 N. C., 170; *S. v. Perkins*, 82 N. C., 684; *In re Deaton*, 105 N. C., 59; *Strickland v. Cox*, 102 N. C., 411); but when the judgment is considered as a whole it appears that the term of imprisonment is fixed and certain; it is to take effect upon the termination of the prior sentence, and there is no provision in the judgment that would not have been written in it by the law.

In other words, the judgment is that the defendant be imprisoned sixteen months, which is to begin immediately if the prior judgment is set aside on appeal, and at the expiration of the prior sentence if it is affirmed, and this is in legal effect a judgment of imprisonment for sixteen months to commence after the expiration of the first sentence.

"It seems to be well settled by many decisions and with entire uniformity that where a defendant is sentenced to imprisonment on two or more indictments on which he has been found guilty, sentence may be given against him on each successive conviction; in the case of the sentence of imprisonment each successive term to commence from the expiration of the term next preceding. It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit." *In re Black*, 162 N. C., 458.

If cumulative sentences are valid, the remaining question for consideration is the effect of a reversal of the first sentence upon the second, and whether provision being made for this contingency (797) makes the judgment a conditional one.

In *Kite v. Com.*, 11 Met. (Mass.), 581, the Court, in speaking of the certainty of a sentence made to depend upon another sentence, and the effect of a reversal of the judgment upon which the latter is based, said: "Though uncertain at the time, depending upon a possible contingency that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then, by its terms, the sentence in question takes effect as if the previous one had expired by lapse of time."

This language from *Chief Justice Shaw* was quoted with approval in *Blitz v. United States*, 153 U. S., 308, and the case is approved by the Circuit Court of Appeals for the Ninth Circuit in *United States v. Carpenter*, 151 F. R., 214, which is also reported in 10 A. and E. Ann. Cases, 509, with note.

In the latter case the following language from *Ex parte Jackson*, 96 Mo., 116, is also quoted as authority sustaining the decision of the Court: "The only point, therefore, left for discussion is this: Whether the prisoner, having been sentenced at the same term of court to three successive terms of imprisonment in the penitentiary, having reversed the judgment and sentence of imprisonment pronounced against him as

to the second or middle term, and served out his sentence as to the first term, is entitled to be discharged from serving out his third or last term. To this point the response must be in the negative, and for these reasons: The judgment upon which the prisoner's second term of imprisonment was dependent having been reversed, the case stands here precisely as if he had served out his second term or had been pardoned as to the offense for which that sentence was imposed, and so his third term of sentence lawfully began upon the expiration of his first term.'"

If, therefore, it was lawful to impose a sentence of sixteen months to take effect at the expiration of the first sentence, and if by legal operation such a sentence would begin immediately upon the reversal of the first sentence on appeal or upon its expiration by lapse of time or otherwise, it cannot impair the validity of the judgment that his Honor set down in words what the law would have written into it.

We are of opinion the judgment is authorized by law.

No error.

Cited: S. v. Butler, 177 N. C. 586 (2f); *S. v. Mills,* 181 N. C. 534 (4g); *S. v. Satterwhite,* 182 N. C. 894 (4f); *S. v. Mills,* 184 N. C. 696 (2d); *S. v. Mills,* 184 N. C. 699 (2j); *S. v. Malpass,* 189 N. C. 354 (4g); *S. v. Brodie,* 190 N. C. 557 (2g); *S. v. Hargrove,* 216 N. C. 572 (2f); *S. v. Fields,* 221 N. C. 183 (4g); *S. v. LeFevers,* 221 N. C. 185 (2f).

(798)

*TENNIE HOWELL v. W. C. HURLEY.

State's Lands—Seals—Signature—Evidence.

For the original grant from the State to furnish evidence that it was signed by the Governor and countersigned by the Secretary of State, it must conform to the constitutional mandate that "The Great Seal of the State" be thereto affixed; and where a paper-writing purporting to be a grant of lands from the State is without the seal, and there is no recital of a seal in the paper, and no evidence that the seal has been affixed, it is inadmissible as evidence in the chain of title by a party claiming the lands.

APPEAL by defendants from *Harding, J.,* at April Term, 1914, of MONTGOMERY.

*This case was decided at Fall Term, 1914, but by inadvertence, evidently due to the burning of the printing plant, does not appear among the cases reported as of that term.

Civil action to recover land, the plaintiff W. R. Howell claiming to be the owner of four-ninths thereof under a deed from four of the children of Bethany Johnson, and the *feme* plaintiff, Tennie Howell, claiming a one-ninth interest as one of the heirs of Bethany Johnson.

The plaintiffs introduced in evidence a paper purporting to be a grant from the State for the land in controversy, issued in 1858 to Jacob Lassiter. No seal was affixed to this paper, and there was no mark or sign on it indicating that it had ever been sealed, and no recital of a seal in the paper.

The defendants excepted to the admission of this paper in evidence.

Jacob Lassiter died intestate in 1861, leaving two children surviving him, Bethany, who married Harris Johnson, and Celia Lassiter. Bethany Johnson died in 1895, leaving her husband and nine children surviving her. Harris Johnson died about four years ago.

The plaintiffs introduced evidence tending to prove an adverse possession for a sufficient length of time to bar the title of Celia Lassiter.

The defendants introduced a grant from the State issued to one Fisher in 1835, and deeds to themselves and to those under whom they claim, which were not connected with the grant, but were color of title, the first of these deeds bearing date in 1861. They also introduced evidence tending to show an adverse possession of the land since 1890.

The contention of the plaintiffs is that Jacob Lassiter became the owner of the land under the grant of 1858; that upon his death the title descended to his two daughters, Bethany and Celia; that Bethany acquired the interest of Celia by adverse possession; that upon the death of Bethany the title descended to her nine children subject to the life estate of her husband as tenant by the curtesy; that the plaintiff W. R. Howell is the owner of four-ninths of the land under deeds from four of the children of Bethany Johnson, and that the plaintiff Tennie is the owner of a one-ninth interest as an heir of Bethany Johnson. (799) They also contend that the possession by the defendants under their deeds confesses no title, because Bethany Johnson was under coverture up to the time of her death, and that there was thereafter an outstanding life estate up to a short time before the action was commenced.

The defendants contend that if the paper introduced is valid as a grant, there as been no adverse possession that would bar the title of Celia, and therefore the plaintiffs would not in any event be the owners of more than five-eighteenths of the land; that the paper is not a grant, because not under seal; that there has been no adverse possession by those under whom the plaintiffs claim; that if there has been an adverse possession, with the paper purporting to be a grant eliminated, this possession would confer title on Harris Johnson and not on Bethany, and that their possession since 1890 would be adverse as to him.

The jury returned the following verdict:

1. Is the plaintiff W. R. Howell the owner of any part of the land described in the complaint, and if so, what part? Answer: "Yes; four-ninths undivided interest."

2. Is the plaintiff Tennie Howell, wife of W. R. Howell, the owner of any part of the land described in the complaint; if so, what part? Answer: "Yes: one-ninth undivided interest."

3. Is the beginning point of the land described in the complaint located at the point north 84 degrees east 82 poles from the point "A" on the map, said point "A" designated in the complaint as John Haltom's and Lassiter's own line? Answer: "Yes."

4. What is the annual rental value of the land described in the complaint? Answer: "$25."

5. Is the plaintiff's right to recover in this action barred by the statute of limitations? Answer: "No."

The answers to the first and second issues were under an instruction to so find if the jury believed the evidence, to which the defendants excepted.

Judgment was rendered in favor of the plaintiffs, and the defendants appealed.

J. A. Spence for plaintiffs.

Jerome & Price for defendants.

ALLEN, J., after stating the case: The contentions of the parties are stated at some length for the purpose of showing the importance to the plaintiff's title of the paper of date 1858, issued to Jacob Lassiter.

If it is not a grant the plaintiffs must rely altogether on adverse possession, and the evidence of such possession introduced tends to show title in the husband, Harris Johnson, as well as in the wife,
(800) Bethany, if not to the exclusion of any claim in her; and if Harris Johnson had acquired title by adverse possession prior to 1890, a possession of like character by the defendants since then under color would confer the title on them.

It follows, therefore, that the peremptory instruction to the jury, which would be objectionable if the paper is a grant on account of the controversy as to adverse possession, is clearly erroneous if the paper is not a grant.

The Constitution, Art. III, sec. 16, leaves no ground for discussion as to the validity of the paper. It provides: "All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with 'The Great Seal of the State,' signed by the Governor and countersigned by the Secretary of State," and in *Richards v.*

Lumber Co., 158 N. C., 56, the Court, speaking of the seal, says: "The original grant is filed in the record. There is no question made by any one but that it is genuine. This is shown by the great seal of the State. When that appears, the signature of the Governor and the Secretary of State on an instrument, thus issued from the Secretary's office, are presumed to be genuine."

If, therefore, it is the mandate of the Constitution that all grants shall be sealed with "The Great Seal of the State," and if the seal furnishes the proof of the genuineness of the signatures of the Governor and Secretary of State, we cannot hold that a paper without a seal is admissible in evidence as a grant, when there is no recital of a seal in the paper and no evidence that a seal had ever been affixed.

This is the same principle which has been applied to deeds. *Patterson v. Galligher,* 122 N. C., 511; *Fisher v. Owens,* 132 N. C., 689.

It follows that the paper was improperly admitted in evidence, and the instruction to the jury erroneous.

New trial.

Cited: Howell v. Hurley, 170 N. C. 401 (S.c.O).

PRESENTATION OF THE PORTRAIT

OF

HON. GEORGE DAVIS

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

SAMUEL A'COURT ASHE

Captain ASHE said:

I have been asked by the family of George Davis to present his portrait to the Supreme Court and to request that it may take its place on your walls in company with those of the other distinguished men who have adorned the Bench and Bar of this high Court. As great as the honor is to have one's portrait preserved here, but few have been more worthy of it than the most illustrious son of the Cape Fear, whose memory is an inheritance of the State and whose career and walk in life present a study at once attractive and profitable. Mr. Davis was a thorough Carolinian—the evolution of conditions on the Cape Fear River.

While the southern part of North Carolina was an unbroken wilderness, the Davises, the Moores, and his other progenitors made the first clearings on the lower reaches of that broad and noble stream. But, although the first to settle, they did not suffer the hardships that usually attend those who venture to subdue the primeval forests. They were not denied the companionship of friends, or social enjoyments, or the comforts that wealth affords. There were four of the Davis brothers in the original settlement; and one of them, Jehu, the forefather of George Davis, in reply to the complaint of the Royal Governor that they had taken up too much land, represented that he and half a dozen other proprietors held only 75,000 acres of land, while they owned 1,200 slaves, and were entitled to more land. They were a company of friends and kinspeople, accustomed to affluence, removing from Albemarle and South Carolina to a better location.

In the maternal line, Mr. Davis was descended from William Swann, who settled Swann's Point opposite Jamestown in Virginia, and died there in 1638, and from Major Alexander Lillington, who in 1676, along with George Durant and others, turned out the Governor appointed by the Lords Proprietors, and established a free parliament in Albemarle; and in every succeeding generation his forbears and kinsmen were concerned in the administration of public affairs.

The names of Roger Moore, of Maurice Moore, of Edward Moseley, and Sam Swann were still familiar in the households of New Hanover when on 1 March, 1820, at Porter's Neck, overlooking the ocean, George Davis was born to his parents, Thomas Frederick Davis and his wife, Sarah Isabella Eagles. He was their youngest child, the eldest, Thomas, born in 1804, being then a student at the University, Junius coming next, and then Ann, afterwards Mrs. Poisson, endowed with unusual intellectual gifts and one of the most charming of her sex. Joseph Eagles, the father of Sarah Isabella, was a gentleman of elegant culture, and she herself was beautifully accomplished, and her children received from her many lovely characteristics.

It was thus amid the best social surroundings that the youth of George Davis was passed; nor were the elements of a sturdy patriotism lacking. He himself has drawn this picture:

"In my early youth I remember an old man, bowed by age and infirmities, but of noble front and most commanding presence. Old and young gathered around him in love and veneration to listen to his stories of the olden times; and as he spoke of his country's trials, and of the deeds and sufferings of her sons, his eyes flashed with the ardor of youth and his voice rang like the battle charge of a bugle."

Impressions such as these, received in boyhood, necessarily left a deep mark on the individuality of George Davis.

After being taught by excellent instructors, he was finally prepared for college by Moses A. Curtis, later the distinguished minister and botanist, who was then employed by Governor Dudley as a tutor for his children. How diligent he was as a boy is attested by his entering the University when fourteen and graduating in 1838, having just passed his eighteenth birthday. He shared the first honors of his class with Mr. Cuthbert, and delivered the valedictory. In that address he gave evidence of thought and scholarship. Speaking of the departure of his classmates from the University, he indulged the hope that "we will leave behind us a *not unremembered name*"; and, doubtless, afterwards that thought was broadened, and the hope became interwoven with his life's work.

His brother, Thomas Frederick Davis, was practicing law at Wilmington, and, on graduating, George Davis entered his office and applied himself to the study of the law with the earnest purpose to excel in his profession. Notwithstanding the social allurements of those halcyon days on the Cape Fear, he never abandoned the habit of diligent study formed in youth, but sought to win professional rewards by close application and painstaking preparation, seldom equaled among the lawyers of North Carolina. First and last, he was a student of the law; but he did not neglect that literary culture that contributed to make him an orna-

ment of his profession. While striving to become well versed in every department of legal learning, he also maintained a familiar acquaintance with the classics and was an appreciative reader of general literature. He thus developed not only into the learned lawyer, but into the man of letters, the polished gentleman, and, withal, the eloquent advocate. In those early years—perhaps it was when his brother abandoned the law to enter the ministry—Mr. Davis, in reply to a remark of a kinswoman, said that his own purpose was to pursue the law and attain the head of his profession. He possessed not only hope, but confidence.

The Wilmington Bar, from the days of Hooper and Maclaine, had ever been strong, with memories of the great equity lawyer, Samuel R. Jocelyn; of the accomplished William H. Hill and erudite William K. Halsey; of Joseph Alston Hill, the superb orator, and William B. Meares, of acknowledged eminence; of Owen Holmes, of Judge Strange and Judge Toomer; but it never had been stronger than during the period of Mr. Davis's career, when, adorned by William A. Wright, famed as a draughtsman of pleadings and as a conveyancer; by Joshua G. Wright, who added eloquence to his brother's learning; by Lucien Holmes, who had drunk deep at the well of the common law; by Mauger London and Adam Empie, versed in commercial law; by Duncan K. MacRae, the Meareses, the Waddells, the Devanes, and others learned and astute; and particularly by Robert Strange and Samuel J. Person, who took rank with Mr. Davis as an advocate and shared with him the high honors of the profession. Those, indeed, were competitors, magnificent in their equipment, strenuous in the contest, and calling for the exercise of the highest powers, if victory were to be won. But by diligence and careful preparation, Mr. Davis successfully coped on many a field with the ablest of his adversaries.

Two years after he came to the bar, his future being assured, Mr. Davis had the good fortune to win the heart and hand of Miss Mary A. Polk, a daughter of Thomas G. Polk and a descendant of Colonel Tom Polk, immortal as the patriot leader who proclaimed independence in Mecklenburg in May, 1775—herself a lady of rare loveliness of character and of person, whose gentleness and refinement drew the heart of every associate to her, and who was in full sympathy with the elegant tastes of her husband. A delightful atmosphere pervaded their home. Mr. Davis himself had a charming personality: was dark rather than blond, carried his head with an easy poise, was gracious in his manner, and possessed the art of pleasing to a remarkable degree. Full of information, quick, and with a ready mind, he excelled in conversation and was a delightful companion. With all the manliness of his race, he was bold and courageous when need be, but was ever the courtly gentleman. Like his brother, the saintly bishop, he was pure in thought and action,

and a devout Christian. Familiar with the trend of scientific thought, he was never shaken in the belief he learned at his mother's knee, but all hard matters of religious import that passed his comprehension he humbly relegated to the realm of faith, and he accepted with a clear conscience what was hidden in obscurity or was beyond his understanding.

Writing of him after his death, Mrs. Jefferson Davis said:

"He was one of the most exquisitely proportioned of men. His mind dominated his body, but his heart drew him near to all that was honorable and tender, as well as patriotic and faithful, in mankind. His literary tastes were diverse and catholic, and his anxious mind found relaxation in studying the literary confidences of others in a greater degree than I have ever known in any public man except Mr. Benjamin. One of the few hard things I ever heard him say was when someone asked him if he had read Swinburne's *Laus Veneris*, and added, 'You know it is printed on wrapping paper and bound in wall-paper,' he replied: 'I have never thought wall-paper wholesome, and am sorry to know there is enough wrapping paper on which to print it.'"

Tolerant of human infirmities, Mr. Davis pursued the tenor of his life so evenly as never to have excited animosities; but he so despised ignoble conduct that it aroused his wrathful indignation, and he could neither spare a miscreant nor refrain from denouncing any departure from fair dealing.

Such was the man, himself of a tender and affectionate nature, a polished, courtly gentleman, loyal and steadfast in his friendships, with high ideals and lofty purposes. His motto seems to have been *Thoroughness,* and his guiding star *Truth.*

He was always at home among his books, and he made friends of the choicest authors, and thus he was enabled to give an elevated tone to his addresses—even those hastily delivered, on a sudden occasion, in the courthouse—and his reputation grew as an elegant as well as an eloquent orator.

On the occasion of the death of Henry Clay he made an address that serves at once to illustrate the power of his imagination, his sentiment, and the simplicity of his style. I quote a paragraph:

"He who has watched the sun in its bright course through the firmament and seen it gradually decline, until it went down in darkness beneath the horizon, may turn from the contemplation with no feeling of sorrow or regret, for he knows that the period of its absence is mercifully ordained as a season of necessary repose to him and all, and that the morrow will restore its beams to revive and reanimate all nature. But if the last declining ray which struck upon his eyelids had brought to him the conviction that he had gazed for the last time upon the sun in the heaven—that henceforward there was to be no more rising nor setting, no morning nor evening, nor light, nor heat; no effulgent day, with all its glorious beauties and excellencies, but night and darkness, unrelieved save by the twinkling stars, were to be the law

of the earth forever—with what sensations would the poor wanderer view the last setting of the sun!

"With feelings somewhat akin to those I have imagined, we behold the death of the great and good whom we love and reverence. But now they were here, with all the generous impulses and excelling virtues that dignify and adorn humanity clustering thickly around them. We rejoiced in their presence, we were better under their benignant influence, we were happy in their smiles—we felt that it was day, and looked not into the future. They are gone! The places of earth shall know them no more forever. The mysterious law which loosens the silver cord and breaks the pitcher at the fountain penetrates the heart. The darkness and the thick night of desolation are upon us. But we have more than the pale rays of the twinkling stars still left to guide and cheer. By the light of their lofty deeds and kindly virtues memory gazes back into the past, and is content. By the light of Revelation Hope looks beyond the grave into the bright day of immortality, and is happy. So with the consolation of memory and hope, let us take the lesson of the great calamity which has befallen our country."

One observes here the simple diction of Swift, and the elevated sentiment of Addison, and particularly a play of the fancy that has not often been found in the writings of a Carolinian. It has been these characteristics that have distinguished Mr. Davis, whether as an author or orator.

At the Commencement of 1855 Mr. Davis was the orator at the University, and choosing for his subject *The Men of the Cape Fear in the Olden Time,* he delivered an address that Dr. Battle in his *History of the University* mentions as an *"extraordinary address,"* and the historian adds that "the interest was enhanced by the excellent delivery." Mr. Davis had familiarized himself with the history of the Cape Fear from original sources, and in a series of bold outlines he presented views of men and events so skillfully, so masterfully, so eloquently, that his address was an epic in prose, abounding in lofty flights, and, withal, casting such a halo of romance about his subject that it served at once to enlighten the State on Cape Fear history and to awaken an interest that still survives.

The next year, at the Greensboro Female College, he voiced his appreciation of a liberal education in the following notable sentences:

"A rich and well-stored mind is the only true philosopher's stone, extracting pure gold from all the base material around. It can create its own beauty, wealth, power, happiness. It has no dreary solitudes. The past ages are its possession, and the long line of the illustrious dead are its friends. Whatever the world has seen of brave and noble, beautiful and good, it can command. It mingles in all the grand and solemn scenes of history, and is an actor in every great and stirring event. It is by the side of Bayard as he stands alone upon the bridge and saves the army. It weeps over the true heart of chivalry, the gallant Sidney, as with dying hand he puts away the cup from his parched and fevered lips. It leaps into the yawning gulf with Curtius; follows the white plume of Navarre at Ivry; rides with Hampden; mounts the scaffold with Russell, and catches the dying prayer of the noble

Sir Harry Vane. It fights for glory at the Granicus, for fame at Agincourt, for empire at Waterloo, for power on the Ganges; for religion in Palestine, for country at Thermopylæ, and for freedom at Bunker Hill. It marches with Alexander, reigns with Augustus, sings with Homer, teaches with Plato, pleads with Demosthenes, loves with Petrarch; is imprisoned with Paul, suffers with Stephen, and dies with Christ. It feels no tyranny, and knows no subjection. Misfortune cannot subdue it, power cannot crush it, unjust laws cannot oppress it. Ever steady, faithful, and true, shining by night as by day, it abides with you always and everywhere."

In the years that were to come, when vicissitudes overtook him, and overwhelming calamity oppressed him, Mr. Davis doubtless found comfort and strength in similar thoughts, and met the storm with a calmer soul because of them.

While a student of history and of general literature, Mr. Davis was more particularly interested in the story of his own people, and from time to time he embodied his thoughts in addresses that were always cast with the skill of an orator and that contain many passages of singular merit, inflaming the imagination and fastening on the memory the pictures he so masterfully presented. Indeed, among the public men of the State he stands almost alone as a master in the field of literary endeavor.

In the third volume of Southern Literature, Dr. Alphonso C. Smith, a competent and severe critic, accords to Mr. Davis deserved praise for excellence in literary attainment and literary accomplishment. He properly attributes to him the rare power of the

> "Choice word and measured phrase above the reach
> Of ordinary men."

Besides emphasizing that Mr. Davis possessed the most important quality of the trained historian, he says that he brought an interpretative imagination to bear upon every subject that he discussed; that he visualized the scenes and vitalized the events that he sought to portray. "It is this quality of mind," continues Dr. Smith, "that gives color, locale, and atmosphere to what would otherwise be mere abstract statement or unrelated fact. This vivifying power is not the exclusive dowry of the poet, but distinguishes equally the orator from the mere talker, the historian from the mere annalist." And then Mr. Davis "had that rarest of gifts, the feeling for the right word in the right place. There was no straining after effect, but his style was always clear, strong, and flexible. He could be dignified without being heavy, and playful without being light." According him great power as an orator, Dr. Smith adds: "His power over an audience did not rest merely on oratorical gifts, but rather upon the high moral, social, and civic ideals which he exemplified in his daily life."

Never seeking political honors, never a candidate for public place, Mr. Davis was still highly esteemed by the Whig Party as in thorough accord with its policies. Indeed, in 1848, without his knowledge, he was voted for in the Whig Convention for the nomination of Governor, and came within one vote of being nominated. At length the troubles of 1860 came to disturb the placid course of events. In the campaign of that year his full influence was given to the Constitutional Union Party, and he warmly supported John Pool for Governor and John Bell for the Presidency.

In the dark hours of January, 1861, when the Cotton States were withdrawing from the Union, the eyes of many turned to him for inspiration and guidance; and when the North Carolina Assembly appointed delegates to a National Convention, seeking some settlement of the sectional issues that would restore and preserve the Union, Mr. Davis was selected as one of them, his associates being Chief Justice Ruffin, Governor Morehead, Governor Reid, and Daniel M. Barringer.

The Convention met at Washington February 4th, and was attended by delegates from nearly every State except those on the Pacific, and those that had seceded. At the outset, however, Salmon P. Chase negatived the idea that the North would make any concession, declaring that "the election must be regarded as a triumph of principles cherished in the hearts of the people of the Free States," while Mr. Lincoln urged his friends, "No step backward."

All resolutions were referred to a grand committee. Nine days passed with no report. At length, on the tenth day, the committee reported a proposition for a constitutional amendment composed of seven sections. Two weeks elapsed in secret session, the South awaiting the result of its appeal to the Union sentiment of the North—in anxious suspense.

On the 27th Mr. Davis telegraphed: "The Convention has just adjourned. North Carolina voted against every article except one." In the Convention each State had a single vote, cast by a majority of its delegates. Davis, Reid, and Barringer determined the action of North Carolina, Ruffin and Morehead accepting the propositions, not because they were at all satisfactory, but with the hope of preventing war.

The Republicans in Congress, however, had no mind to prevent war. Chandler, of Michigan, gave voice to their purposes when he declared in the Senate: "No concession; no compromise; aye! give us strife, even blood, before a yielding to the demands of traitorous insolence!"

Union sentiment was in the ascendant in North Carolina; but among the people of the Cape Fear section the hope of an amicable adjustment had almost faded away. On the return of Mr. Davis the citizens of Wilmington invited him to address them, and he immediately complied. He declared that he had gone to the Peace Convention determined to

exhaust every honorable means to obtain a fair, honorable, and final settlement of existing difficulties. He had striven to that end, to the best of his abilities, but had been unsuccessful, for he "could never accept the plan adopted by the Convention as consistent with the rights, the interests, or the dignity of North Carolina." It was a masterly address, and the people were profoundly impressed.

From that time the Cape Fear was entirely united. It followed Mr. Davis.

The recommendation of the Peace Convention, as favorable as it was to the North, however, was not accepted by the malignants in Congress.

President Buchanan had declared that he would never embrue his hands in the blood of his countrymen; but after a fortnight of vacillation, war was determined on by Mr. Lincoln and his cabinet; and it opened at Charleston on April 12th. When it came—when the only question presented was whether we should fight with or against the South—all differences among our people ceased.

The State Convention on June 18th chose delegates to the Confederate Congress, two for the State at large and one for each district. Mr. Davis received the highest vote given for those presented for the State at large, and on July 20th took his seat in the Provisional Congress of the Confederacy.

At the following session of the General Assembly there were a dozen distinguished men proposed for Senators, and several days were passed in unsuccessful balloting; but eventually those who had been former Whigs—the former Union element—gave Mr. Davis and Mr. Dortch enough support to elect them over all others.

In the Senate Mr. Davis took high position. At Jackson, Lee, and Bishop-General Polk—the uncle of his wife—bore themselves in the field, so did he bear himself in the Senate. He was steadfast and determined. The sword being drawn, his country at war, the independence of the Southern people at stake, he knew nothing but to foster the Cause, to strengthen the army, and to make every exertion to attain victory.

Unhappily in North Carolina all were not of that mind. At the August election, 1862, a faction in the State, calling themselves Conservatives, dominated the Legislature; and, in turn, it was measurably dominated then by William W. Holden, the editor of *The Standard,* who, however, had not yet gone to the full length of his subsequent career. But every Conservative who gave aid and comfort to a "Destructive," as Holden called the Confederates, was stigmatized as guilty of a breach of faith.

As mentioned by Dr. Hamilton in his *Reconstruction in North Carolina,* when the Legislature met, "it proceeded to oust the Secretary of State and the State Treasurer, the beginning of the execution of the

policy Holden had mapped out." "And in further pursuance of this plan," says Dr. Hamilton, Mr. Davis was not reelected to the Confederate Senate." His term was to expire on 17 February, 1864, and his superior excellence was so apparent that, in January 1864, the President invited him to accept the position of Attorney-General in his cabinet, the post previously held by Governor Bragg. Then ensued a period of close intimacy between these two great men, animated by the same holy patriotism, in which they became endeared to each other.

In those troublous times, when a faction was intent on criticising the President and others were throwing impediments in the pathway of the Administration, when at every turn some malcontent stood ready to denounce the measures taken to secure victory as oppressive and tending to despotism, there were necessarily many delicate questions to be considered by the Attorney-General. It has been said that Mr. Davis was a "strict constructionist," meaning that he maintained the rights of the States where power had not been delegated to Congress. In his opinions he was independent, and it was not always that he agreed with the President. But he brought to the consideration of all subjects an unbiased mind and profound reflection, and doubtless the weight of his argument often carried conviction and determined the action of the cabinet. Of his colleagues, Benjamin alone was of equal excellence, and while Benjamin possessed a master mind, he probably was not more conversant with constitutional or international law than Mr. Davis was. Of his relations with the President, it is only needful to quote from a letter written by Mrs. Jefferson Davis to Dr. James Sprunt:

> "Mr. Davis' public life was as irreproachable as his private course. Once when my husband came home weary with the divergences of opinion in his cabinet, he said: 'Davis does not always agree with me; but I generally find he was right at last.' My husband felt for him the most sincere friendship, as well as confidence and esteem, and I think there was never the slightest shadow intervened between them."

During the year 1863 Mr. Davis suffered a severe bereavement in the death of his beloved wife, who left several children of tender age to his care. The oldest child, Junius, just seventeen, had already abandoned his studies, and had enlisted as a private in Moore's Light Battery at the front in Virginia. The home had to be broken up.

Meeting at Richmond Miss Nominia Fairfax of Virginia, Mr. Davis was drawn to her by her loveliness and her gentleness, and he found her a woman of fine accomplishments, with sympathies and tastes in thorough accord with his own. Their intercourse ripened into affection, and eventually they became engaged to be married. Shortly afterward Wilmington fell, General Lee was forced to evacuate Petersburg, and Richmond was hastily abandoned.

Mr. Davis accompanied the President to Charlotte, where for a few days the Confederate Government survived.

It is beyond my capabilities to adequately describe conditions during those historic days when the light of the Confederacy was being extinguished; when the star of hope faded away; gloom gave place to despair, and black night overcast our lives. It was the occasion imagined by Mr. Davis years before—when one gazed for the last time upon the sun in the heavens, when henceforth there was to be no more rising nor setting, no morning nor evening, nor light nor heat, no effulgent day, but only darkness and night. Each somber hour brought us step by step to the final catastrophe.

The sudden proximity of a division of Federal cavalry, as if it had dropped from the clouds that hung so low and heavily over us; the attack of a disorganized regiment on a Government storehouse to possess themselves of its contents; the assassination of President Lincoln, and the startling information that the murder was attributed to the machinations of President Davis and other Confederate leaders; the refusal of General Johnston to prolong the struggle, and the surrender of the Confederate forces under his command; the downfall of the Confederacy and the dissolution of government; the chaos that ruled amid the calamity and wreck of all of our hopes—these heart-rending events came in quick succession, utterly overwhelming us. My own orders to report across the Mississippi were annulled, with a suggestion to go home. Necessity led me to take thought for the morrow. Hearing that there was some specie in a train, I asked Mr. George Davis about it, saying that I had no money. With an expression of great pain, betokening that his own situation was felt most sorely, he replied that he knew nothing of it; that he himself had not a dollar, and knew not what to do. As Confederate money fell with the Confederacy, there was no longer any currency. There was no money. One could not pay for anything, for there was no currency. Mr. Davis, like every one else, was penniless.

The President proposed to pass on to the South. Mr. Davis, oppressed not only by the common calamity, but by his personal situation—with thoughts, first, of his obligations to his country, and, then, of his duties of manhood, anxious for his scattered children, and solicitous for her to whom he was affianced—applied to the President to know if his services as Attorney-General were longer required, and received a reply in the negative. The President added:

"It is gratifying to me to be assured that you are willing, at any personal sacrifice, to share my fortunes when they are least promising, and that you only desire to know whether you can aid me, in this perilous hour, to overcome surrounding difficulties. It is due to such generous friendship that I should candidly say to you that it is not probable for some time to come

your services will be needful. It is with sincere regret that I look forward to being separated from you. Your advice has been to me both useful and cheering. The Christian spirit which has ever pervaded your suggestions, no less than the patriotism which has marked your conduct, will be remembered by me when in future trials I may have need for both."

On the next day, the 26th of April, his resignation having been accepted, Mr. Davis bade farewell to the President, who with an escort departed for the South.

In that dire hour, when black night came, with no hope of dawn, the friends separated—each to face perils, to bear calamity, to undergo fearful experiences—but to meet once more on an historic occasion, amid great anxiety, which, happily, gave place to rejoicing, in which the entire South had its share.

Fortunate was it for the human race that when Pandora's box was closed there must have remained in it not only hope, but fortitude—such fortitude as made many an ancient famous; such fortitude as has been the noblest attribute of man in all ages, and has not been wanting in our own times—such as was displayed by the men of the Titanic when the waters of oblivion were ready to receive them. With equal manhood and fortitude Mr. Davis stood prepared for the ordeals that awaited him. He took his way to the home of his brother, the venerable Bishop of South Carolina, and in its seclusion, in its atmosphere of piety and resignation, he found needed rest and repose; and there, doubtless, passed between these distinguished men, mingled with brotherly affection, confidences of their pains, their griefs and sorrows, and of their duties to themselves and others. While there, as yet undetermined as to his future, Mr. Davis learned of the order for his arrest and the arrest of all the Confederate cabinet, and of the proclamation issued by President Johnson offering a reward of one hundred thousand dollars for the capture of President Davis.

He felt that it was his duty to preserve his life and liberty, and to seek to provide for his children; and his only hope lay in escaping from the country and reaching England. About the middle of May, then, he left his brother's and sought a way to the coast. Some account of what befell him is contained in a letter to his son, Junius Davis, who fortunately survived the perils of the retreat from Petersburg, and of Appomattox, and after an adventurous career had returned to Wilmington:

ON BOARD U. S. S. MEMPHIS,
AT SEA, 14th November, 1865.

MY DEAR SON:—After numberless anxieties, difficulties, troubles, hardships and dangers, I find myself a prisoner of war on board this ship on my way to New York to await the action of the Government.

My life for the past six months has been so sadly painful that I hate to recall it. But I must give you an outline. Some day before very long I hope

to be able to tell you all the incidents of my long wanderings. I arrived in Florida on the 3d of June at Cousin Sophie Lane's, not far from Lake City, and stayed there two days; then to Mr. Chestnutt's near Gainesville, where I stayed ten days; then to a gentleman's near Ocala, where I stayed six days longer, and then went down into Sumter County—on the very verge of civilization and clean beyond good morals and religions—where I remained near three months, waiting in vain for a chance to get abroad. At length, I heard of a gentleman about to sail from Smyrna, on the east coast, for Nassau, and going there, he kindly offered me a passage. But when I saw the craft in which he proposed to make the voyage, I was amazed at the rashness of the undertaking. The Gulf Stream between Florida and the Bahamas is notoriously the most dangerous navigation on the whole coast; and fancy the attempt to cross it during the equinox in a little boat about twenty feet long and seven wide, with rotten sails and a leaky hull! But the gentleman was determined to go, and I wouldn't be left behind. We sailed from Smyrna on the 15th of September, and the calculation was that, with good luck, we would reach Nassau in five or six days. Instead of that, we were thirty-three days beating about the coast, sometimes on the open sea and sometimes in the bays and among the reefs and keys—often straitened for food, and repeatedly in such imminent peril that nothing but God's Providence saved us from destruction. At length, being far down the coast, and finding it impossible to reach Nassau, we bore away for Key West, where we arrived on the thirty-third day. There I learned the action of the Government in releasing the other members of the Cabinet, and I immediately determined to return and surrender myself. But while awaiting the arrival of a vessel in which I might take passage, I was arrested. I have no idea what my destination will be—probably Fort LaFayette and solitary confinement; but if they let me communicate with and see my friends, even that will be preferable to the life I have been leading. When I know what is to be done with me, I will write you again, and you must write me as soon as you ascertain where I am.

Happily the frenzy that once possessed the North had spent somewhat of its virulence, and, despite the bitterness that rankled in the hearts of the irreconcilable malignants, moderate counsels prevailed.

After some months of confinement at Fort Hamilton, Mr. Davis was released on parole, to remain within the State of North Carolina, and to report his residence monthly to the military authorities.

Returning to Wilmington, he gathered his children around him, and opened his office for the practice of his profession.

As soon as circumstances admitted, he sought the fulfillment of the promise given him by Miss Fairfax, who was persuaded to come to North Carolina, and they were married at Weldon on the 9th day of May, 1866, and Mr. Davis entered again on domestic life, made still dearer by its added cares, by the quietude that succeeded the storms and trials of the past, and by his entire participation in the sorrows and griefs, in the hopes and apprehensions of his community.

And he met the new conditions with an admirable philosophy.

"During the years that remained to him," remarks Dr. Smith, "he threw his influence in favor of complete reconciliation and readjustment.

There was no weak plaint over an irrevocable past, but only brave words and high courage for the new duties that the new régime imposed."

To the people his manly acceptance of the misfortune that had overtaken him, his uncomplaining endurance of the ills that had to be borne, were object-lessons of great value. And true it is that the greatest service one renders his community is in times of adversity rather than in the days of their prosperity. The force of his example, like that of Lee, was not without its effect, and vain repinings faded away in the new life of the community.

His home was a delight. It was a privilege to enter there and share in its enjoyments: light and sweetness mingled with dignity and repose. Especially was it attractive to his young kinsmen, whom both Mrs. Davis and he received with warm affection, giving them sympathy and love, and imparting strength and fostering right living and unselfish action.

Mr. Davis had never sought popular applause; had never been a candidate for public favor. His inclinations led him otherwise. But he valued the esteem and regard of his friends and was deeply interested in whatever affected the life and fortunes of the people.

Pardoned by President Johnson in June, 1866, he was once more a citizen; and he became the wise counselor, the prudent adviser of those who blazed the way out of the difficult wilderness of those evil times. And he constantly grew in personal influence.

In the spring of 1870 General Lee, being in failing health, made a visit to Florida. In returning, he and his daughter stopped for some days with Mr. Davis, and the community paid their respects to him. It was an occasion that touched the hearts of the people, for they still lived in a Confederate atmosphere, and their reverence for General Lee was unbounded. They had never seen him before, and now they almost worshiped him. It was an especial gratification that the revered hero of the Confederacy, whom they esteemed the first man of the world since the days of Washington, should be the guest of their own beloved citizen, and the community felt honored by his presence and more drawn to Mr. Davis than ever. Two months later General Lee passed away, and when the people had assembled in the city hall, Mr. Davis, clad in black, with bowed head and every feature, as well as his posture, betokening grief, delivered an address that in conception and execution has rarely been equaled. By the modulation of his voice and his simple words of grief, he so moved the audience that in every part of the hall men wept, and there was an exhibition of public woe such as has seldom been witnessed.

During the Reconstruction period, when the White people were making a heroic effort to maintain and preserve their civilization, Mr. Davis delivered an address in the opera house that was perhaps the most admi-

rable political effort ever made in America. He rose to the full height of the occasion, and gave free rein to his native eloquence. In the midst of it, a stranger, some Northern man, carried away with excitement and enthusiasm, exclaimed to me: "Good heavens! who is that man? That speech delivered in New York would be worth a hundred thousand dollars to any man." More—it would have immortalized him.

Again, in the great campaign of 1876, when every true son of Carolina put his shoulder to the wheel to make sure of the election of Vance as Governor, Mr. Davis electrified great audiences with his splendid oratory. The learned and critical Dr. Kingsbury, whose elegant taste and discriminating judgment give particular value to his opinion, said of that speech in the *Wilmington Star,* of which he was the editor:

"The speech to which we listened is a very memorable one. It will long abide with us as one of those felicitous, rounded, finished efforts of a highly endowed and noble intellect that will be a memory and a joy forever.

"As a composition the effort of Mr. Davis was very admirable. There was humor, there was sarcasm, there was an exquisite irony, there were flashes of wit, there was an outburst of corrosive scorn and indignation, that were wonderfully artistic and effective. At times a felicity of illustration would arrest your attention, and a grand outburst of high and ennobling eloquence would thrill you with the most pleasurable emotions. The taste was exceedingly fine, and, from beginning to end, the workings of a highly cultured, refined, graceful, and elegant mind were manifest. There were passages delivered with high dramatic art that would have electrified any audience on earth. If that speech had been delivered before an Athenian audience in the days of Pericles, or in Rome when Cicero thundered forth his burning and sonorous eloquence, or in Westminster Hall, with Burke, and Fox, and Sheridan among the auditors, he would have received their loudest acclaims, and his fame would have gone down the ages as one of those rarely gifted men who knew well how to use his native speech and to play with the touch of a master on that grand instrument, the human heart!

"We could refer at length, if opportunity allowed, to the scheme of his argument, to his magnificent peroration, in which passion and imagination swept the audience and led them captive at the will of the magician; to the exquisitely apposite illustrations, now quaint and humorous and then delicate and pathetic, drawn with admirable art from history and poetry and the sacred Truth—to these and other points we might refer.

"How can words, empty words, reproduce the glowing eloquence and entrancing power of the human voice, when that voice is one while soft as Apollo's lute, or resonant as the blast of a bugle under the influence of deep passion? How can human language bring back a forgotten strain or convey an exact impression made by the tongue of fire when burdened with a majestic eloquence?"

Mr. Davis continued for several years to make addresses, political, literary, and historical—all *con amore,* and therefore well done.

His last public appearance was on the occasion of the death of President Davis, in 1889, when he addressed a great assemblage in the opera

house at Wilmington. He was already in feeble health and he spoke with unusual tenderness of his departed friend.

President Davis, after their leave-taking at Charlotte, had been arrested in May, 1865, and confined in Fortress Monroe as a military prisoner, and had been indicted for treason and charged with complicity in the assassination of President Lincoln. Shackled in his casemate, and with a sentry passing momentarily at his door, his health gave way, and the South, regarding that he was suffering a vicarious punishment, felt for him the utmost sympathy and anxiety. The cruelty he endured made the people sore at heart. At the end of two years, on application, the Circuit Court at Richmond issued a writ of *habeas corpus,* and, by order of the President, it was obeyed, and he was surrendered by the military to the Federal court. A motion was made for bail, and all the South held its breath in suspense, hoping that the tyranny would be overpast. The wife of President Davis and many anxious friends attended, awaiting the decision of the court. Among them was George Davis, who had sought his friend for consultation, for support, and to cheer him in this momentous ordeal.

Referring to that occasion, Mr. Davis, in his address, said:

"I promised Mrs. Davis, as soon as I had any intimation of what the court was going to do, to come and report. I never knew how I got out of that courthouse, or through the crowd that lined the streets, but I found myself in Mrs. Davis' room, and reported. In a little while I looked out of the window and saw that the streets were lined with thousands and thousands of the people of Richmond, and scarcely passage was there for the carriage, in which Mr. Davis rode at a funeral gait. And as he rode every head was bared, not a sound was heard, except now and then a lone sigh. And so he ascended to his wife's chamber. That room was crowded with friends, male and female. As Mr. Davis entered, they rushed to him and threw their arms around him. They embraced each other; old soldiers, men of tried daring, cried like infants. Dear old Dr. Minnegerode lifted up his hands, with big tears rolling down his cheeks, and the assembled company knelt down while he offered up thanksgiving to God for having restored to us our beloved chieftain."

Such was the reunion two years after the fateful parting at Charlotte on the dissolution of the Confederacy.

Six years later, Mr. Davis having gone to join his friend in the spirit land, a memorial of him was prepared by James Sprunt, from which I quote a reference to a passage in this last address:

"In the concluding passage, in which he spoke of the President's religious faith, he unconsciously reflected his own simple and abiding trust in God; and we can find no words which more fittingly describe the Christian life of OUR Mr. Davis than those he uttered of his dead chieftain:

"'He was a high-souled, true-hearted Christian gentleman. And if our poor humanity has any higher form than that, I know not what it is. His great and active intellect never exercised itself with questioning the being of

God or the truth of His revelation to man. Where he understood, he admired, worshiped, adored. Where he could not understand, he rested unquestioningly upon a faith that was the faith of a little child—a faith that never wavered, and that made him look always undoubtingly, fearlessly, through life, through death, to life again.' "

Likewise, by way of presenting the man himself, I quote another passage:

"I have often thought what was it that the Southern people had to be most proud of in all the proud things of their record. Not the achievements of our arms. No man is more proud of them than I; no man rejoices more in Manassas, Chancellorsville, and in Richmond; but all nations have their victories. There is something I think better than that, and it was this: that through all the bitterness of that time, and throughout all the heat of that fierce conest, Jefferson Davis and Robert E. Lee never spoke a word, never wrote a line, that the whole neutral world did not accept as the very indisputable truth. Upon that my memory rests more proudly than upon anything else. It is a monument better than marble, more durable than brass."

Again, in *An Episode in Cape Fear History,* one of Mr. Davis's historical addresses, occurs this passage:

"Slavery is in its grave, and nothing can disturb its eternal rest. I would not, if I could, raise it from the dead. The slave is free. God speed him in his freedom and make him worthy of it. The slaveholder has passed into history at the cannon's mouth. His future life must be there, and there he will live forever. He did the State some service; was great in council and in action, clear in honor and in truth, and always a man whenever true manhood was wanted. He knew how to compel the love of his friends and the respect of his enemies, and how to build his proudest monument in his country's greatness. But there are those who never loved him, and whose fashion still it is to make him the embodiment of evil, the moral scarecrow of the times. True, he ended well. True, that as he stood and died by his hearthstone, fighting, as he believed, for God and country, he was something for gods and men to behold. And do they think that the spirit which brought this Republic out of chaos, and directed it for the fifty years of its truest greatness and purity, can be annihilated by a proclamation? And do they believe that Washington and Jefferson and Jackson and Clay and Stonewall and Lee and all of the long roll of our heroes and patriots and statesmen are but dead names, pale ghosts that can but squeak and gibber at their fallen greatness? That they have left no living memories in their children's hearts, no sacred seed that can once more bourgeon and bloom for our country's honor? Oh, no! That spirit is not dead. It will rise again. Not in its old likeness, for old things have passed away. But transformed and quickened into a new life. Once more it will make itself a name for the Nation to sound. Once again it will step to the front and pass first in fight as it was wont to do whenever great opinions are clashing or a great cause imperiled. Once again to the front, whenever and wherever freedom's battle is to be fought. Once again to the front, no more to contend with brethren in arms, but only in generous strife for the glory and honor of a common country."

First, truth and honor—then a just pride in a glorious past, with a confident reliance on manhood for the future—such sentiments were inbred in the very fiber of Mr. Davis, and were the foundation stones on which rested the superstructure of his sentient life.

As a statesman Mr. Davis was guided by the interests and honor of his State and people. In his early years he espoused the doctrines of the political party that stood for improvement. He ranged himself alongside of Dr. Frederick Hill, known locally as the Father of the Public School System, whose bill to establish public schools was incorporated into the act that the Assembly passed inaugurating the school system. He embraced the policy of Dudley, the apostle of internal improvement. He realized that the law of existence is constant change, and that the object of one's endeavors should be progress and betterment. While holding fast to what was admirable in existing conditions, he advocated such changes as offered a hope of promoting the welfare of the State and the elevation, happiness, and prosperity of the people. He was in sympathy with those who sought the amelioration of the hardships of the old law. Nearly fifty years have passed, and in my memory is still an echo of his powerful pleading for the dissenting opinion of Judge Battle in *State against Barfield,* and his earnest presentation of the opinion in *State against Wills* as an enlightened view of the law.

In his profession he was master of the principles, and he kept abreast of the Court by faithfully studying every adjudicated case. He prepared his cases with the utmost pains, and fathomed them to the depths, so that he was ready at every point.

While he was engaged in nearly every important case on the Cape Fear, there is one I must advert to.

In October, 1869, a vessel entered the harbor of Wilmington, claiming to be a man of war fitted out to aid the insurrectionists in Cuba. Among her officers were several ex-Confederate naval officers, who had the sympathy of the community. The vessel was sesized by the Government, as operating in violation of our neutrality laws. The proceedings in court were novel and the law obscure.

Mr. Davis represented the Cuban Junta in New York, and was retained in their behalf by one of the most prominent and able members of the New York bar, their general counsel, who may be called Mr. L. He was at that time, also, general counsel for the Western Union Telegraph Company and many other large concerns. Mr. L. came to Wilmington several times to confer with Mr. Davis about the trial. In one of their first conferences Mr. Davis suggested that the most serious question in the case, and the one that caused him the greatest anxiety, was the standing in court of the claimant of the vessel. The Cuban Junta represented the insurgents, and the insurgents had no legal entity, and their govern-

ment was not recognized as lawful. Mr. L. at first was disposed to pooh-pooh the suggestion; but Mr. Davis persisted in it with such earnestness that when Mr. L. returned to New York he took it into special consideration. He eventually became of the same opinion as Mr. Davis, and wrote to him, frankly acknowledging his own error, and saying that Mr. Davis was entirely right, and that he knew more about the law of the case than he (Mr. L.) did. In that case Mr. Davis displayed an extensive and erudite acquaintance with a branch of jurisprudence developed from the civil law and not within the sphere of the ordinary practitioner; but as Attorney-General of the Confederate States he had sounded all the shoals and knew the quicksands of international law. The trial of the case was a hard and protracted struggle, and told severely on the attorneys engaged in it. Indeed, Judge Person did not survive it, but expired with his harness on. Mr. Davis likewise suffered. He was attacked during the close of the proceedings with fatty degeneration of the heart, and for a long period was most desperately ill—indeed, at one time all hope of recovery was abandoned; but his life had been so temperate, his vitality so unimpaired, that he stood the strain, and finally passed successfully through the crisis.

On the organization of the Wilmington and Manchester Railroad he became general counsel for that company. As a result of the war, the property of that company had to be sold under a decree, at the instance of bondholders, represented by a great firm of New York lawyers. When the time came for the decree to be drawn, the New York attorneys confessed that they could not draw it to meet the involved equities and the difficult requirements of the case, and they were driven to the necessity of asking Mr. Davis to render them that service. But that was hardly singular, for many North Carolina lawyers have certainly been superior to Northern lawyers of the highest reputation.

The Manchester road was incorporated in 1847, and Mr. Davis continued as its general counsel during its existence, and when it was merged in the Atlantic Coast Line he became counsel of that company and so remained until his death, in 1896.

As general counsel of the parent road, developed into the great system of the Atlantic Coast Line, the service rendered by him was of the highest order; and so masterful was he in dealing with the novel questions that necessarily arose in adjusting equities in the successive steps of that complicated business, that in a measure there has been no litigation by that company.

So entirely satisfactory was Mr. Davis's service that the Atlantic Coast Line valued him most highly, appreciating not only his learning and the soundness of his legal opinions, but his excellence and sterling characteristics; and, in association with him as adviser, the management

of that great system has ever worthily received and enjoyed a public confidence that has been accorded to but few others in the history of railroads.

After Mr. Davis's son, Junius Davis, came to the bar, in due course, he was admitted as a partner, and when Mr. Davis died his mantle was worthily worn by Junius Davis; and in recent years Thomas W. Davis has been associated with his father, Junius Davis, the firm still maintaining its former prestige. Thus beginning with George Davis, and then he in association with his son, and then the son in association with a grandson, covering a period of sixty-eight years, the Davises have continued without interruption to be attorneys and counsel for some constituent railroad of the Atlantic Coast Line.

This is a record of long and continuous service without an equal, as far as I know, in our country. It speaks in trumpet tongue of superior excellence, and, under the known conditions, reflects credit on the management of the corporations, while it is a mark of honorable service and of high capabilities on the part of the attorneys.

In 1879, when the Western North Carolina Railroad, which the State then entirely owned, met with difficulties in crossing the mountains, and private parties made a proposition to buy it and complete it, Governor Jarvis became convinced that the proposition should be accepted, and after conference with many of the public men of the State, who assented, he asked the advice of Mr. Davis and Judge Ruffin, and they recommended it. He thereupon requested them to act as special counsel of the State in the matter.

Governor Jarvis convened the Legislature in extra session, and Judge Ruffin and Mr. Davis addressed the Legislature and explained the proposition.

Years afterwards Governor Jarvis thus mentioned Mr. Davis's effort on that occasion:

"It was a great speech, of great sweep and power. His diction was perfect and his manner faultless. Some of his periods, describing the beauty and grandeur of our mountain section and its prosperity under the new State policy, were beautiful in the extreme. His speech swept away all opposition, and when the vote was taken, but few in either House voted against authorizing the sale. After the adjournment of the Legislature, Mr. Davis and Judge Ruffin prepared the deed for the sale of the road and the contract for its completion. For all their valuable service they declined to receive a penny. No two men ever served the State more faithfully, more efficiently, or more unselfishly."

Mr. Davis was particularly noted for his precision in statement and the clearness of his legal instruments. Indeed, his very handwriting was an index of that characteristic, every letter being perfectly formed, and his writing without blemish.

Judge Connor, in an extended address on the life and career of Mr. Davis, said:

"Mr. Davis was one of the great lawyers—the great advocates—of the State for more than a third of a century; he was profound in the learning of the law."

Again:

"One who for many years practiced at the same bar, and whose opinion is of value and judgment is just, says: 'He loved the science of the law, and to it he gave the most devoted study and unremitting toil, forcibly illustrating, by the care and completeness with which he prepared his cases, the amplitude of his researches and his wide survey and scope of knowledge—all combined by consummate skill into clear, cogent, and convincing argument, perfect in its construction.' Among his best and finest arguments, now recalled, are those of *Jaffray v. Bear*, 93 N. C. Rep.; *Williams v. Bank*, 79th; *London v. R. R.*, 88th. These cases are all familiar to the bar as involving new and difficult questions of law."

"A gentleman of fine discrimination and severe standards" is quoted by Judge Connor as saying:

"One of the most beautiful arguments, as well as the most persuasive and convincing, I have ever heard, was made by Mr. Davis while too feeble to stand in court, and speaking, by permission, from his chair."

Judge Connor adds his own appreciation:

"His kind consideration, his courtly bearing, and his charming manner relieved in a very large degree the embarrassment of a young judge presiding over a court with a bar of recognized ability. He argued several causes, in one of which was involved a number of difficult questions, regarding the always difficult question of the contractual liability of married women. Aided by his learning, I was enabled to steer clear of error—at least, it was so held by the Supreme Court. I recall that he expressed regret that we had not given full force and effect to the constitutional and statutory changes in the law in this respect."

In criminal cases Mr. Davis was strong and effective, and whenever he was to speak the courtroom was always crowded to overflowing. The general outpouring of the people on such occasions was a tribute to his oratory and to his powers as an advocate that was accorded to no competitor.

And, indeed, in a particular manner, if your Honors please, did the people of the State manifest their appreciation of Mr. Davis's excellence as a jurist and as a citizen. When the term for which the Chief Justice elected in 1868 was approaching its end, and the time was ripe for nominations, he was generally thought of in connection with the office of Chief Justice. On 23 December, 1877, *The Raleigh Observer*, then

edited by Peter M. Hale and William L. Saunders, contained the following editorial:

"As was natural, when the time came to look around for men to put up upon the highest judicial tribunal in the State, and people everywhere began to seek out the ablest and the best, the people of North Carolina instinctively and, we may say, almost with one consent cast their eyes upon Mr. George Davis of Wilmington. As pure as he is able, and as able as he is true and devoted to the land that gave him birth, North Carolina never had a more worthy, a more brilliant, or more devoted son than he, nor one better fitted in all the qualities of head and heart for the high position to which people everywhere expected him to be called. It is with unfeigned regret, therefore, that we publish the following letter to a gentleman in this city announcing Mr. Davis's purpose not to allow his name to be used in connection with the nomination for the Supreme Court bench, and giving his reason therefor."

In this letter Mr. Davis said:

"No man can hold in higher estimation than I do the dignity of such a position. To fill it worthily would be my highest ambition. But in this thing, as in so many others, I am obedient to necessity. I cannot live upon the salary. And barely to live is not all my need. One of my first duties in life now is to endeavor to make some provision for the little children that have come to me in my age. At the bar such an expectation may not be unreasonable when better times shall come. But upon the Bench I should be compelled to abandon such a hope forever. I must, therefore, decline to permit my name to go before the Convention of the Democratic Party in connection with such a nomination."

Hardly had that announcement been made when Chief Justice Pearson suddenly died. There was "a universal manifestation of opinion that Mr. Davis was the first man in the State to whom the position should be offered." Governor Vance was at Charlotte, and, returning to Raleigh, told Colonel Saunders that "the universal expression was that Mr. Davis was the person to whom the people were looking to be made Chief Justice, and that aside from his desire to meet the expectations of the people, and to make a good appointment, he desired Mr. Davis to accept the position, as it would relieve him from embarrassment in choosing from between others. He was satisfied that his appointment would not give offense to any aspirant not appointed."

As Colonel Saunders said, "To relieve that embarrassment it was necessary that the new Chief Justice should be *facile princeps*." And this was the recognized position of Mr. Davis. Governor Vance tendered the appointment to Mr. Davis, who declined it, for the reason previously given in declining to allow his name to be considered by the convention when it should meet.

Governor Vance some days later, in a letter to Mr. Davis, said:

"I desire to avail myself of this opportunity to say to you, in person, what I have often said and always thought in your absence, that you are one of the men who have steadily pursued principle for its own sake, spurning alike the temptations of office and the lures of ambition when they came not strictly within the utmost requirements of dignity and manly honor. As such there has come to me, as the result of my position, no greater happiness than the ability to testify my appreciation of your character and worth, and of the great service your example has been in shaping and toning the political ethics of our society. In attempting to honor you by the bestowal of that great office I have also attempted to show what is my own sense of State honor as well as to give expression to the general voice of our people."

I am sure that Mr. Davis wished that he could have accepted the office. It would have given him the greatest satisfaction to have worn the ermine here. Indeed, it was the only official station that could have tempted him to forego the pleasures of private life, but it would have gratified his ambition and he would have prized the honor and would have found happiness in association with his fellow members of the Court.

The passing years left their impress upon him, and, somewhat enfeebled, he retired from the exacting duties of his profession, still, however, continuing as the adviser of the great companies he had formerly served so well.

Eventually, on 23 February, 1896, having lived more than three-quarters of a century, Mr. Davis was gathered to his fathers.

The people of his community were profoundly moved. No other man had ever been so revered on the Cape Fear.

The Chamber of Commerce appointed James Sprunt, William Calder, and William R. Kenan a committee to prepare a suitable memorial and record of his life. The memoir presented to the Chamber of Commerce on 5 March, 1896, and published by it, is a masterful presentation of the characteristics, the attainments, and the literary accomplishments and of the surpassing worth of Mr. Davis. In it I find an estimate of Mr. Davis by Warren G. Eliot, himself a distinguished North Carolinian, from which I quote:

"Mr. Davis gave to us a splendid illustration of every manly virtue. He was a good man, a just man, a strong man, a patriotic citizen, full of love and affection for his native State; a lovable, companionable friend; affectionate and tender in his domestic relations; a brave and fearless man, with a love for the right and a scorn for the wrong; chivalrous and honorable; a true type of the Olden School—the type that never had a superior, and never will. His life was a lofty ideal, a standard to be lived up to, and worthy to be followed.

"He has laid down his armour when the tide was at its ebb, after having enjoyed, during a long and eventful life, the greatest riches that this world

can bestow—the genuine love, reverence, respect, and admiration of his fellow-man, with his integrity unstained, and without a whisper of detraction against his motives, his character, or his purposes. And the Christian grace and dignity with which he met the final summons was but the crowning glory of an honorable and exemplary career."

Later, the people of Wilmington, desiring to give a more substantial expression of their estimate of their beloved and revered fellow-citizen, acting through the Daughters of the Confederacy, erected a monument to his memory, in the heart of the city, and placed upon it an imperishable statue of his person, the first statue erected in North Carolina to a private citizen by the community in which he lived.

Truly Mr. Davis's early hope was realized—he did not "leave an unremembered name."

This statue was unveiled 20 April, 1911, and on that occasion Honorable Henry G. Connor delivered a comprehensive address commemorative of Mr. Davis, that was worthy of the great man who was the subject, and that reflects the high ideals, the sterling patriotism, and the literary excellence of the accomplished author.

To that address and to the admirable memoir prepared by Dr. James Sprunt, I am indebted for much material that I have used.

May I say, in conclusion, that in my early manhood it was my good fortune to have known Mr. Davis well, to have sat at his feet, and to have learned there much that I hope entered into my life; and that I have never ceased to be grateful that he accorded me his affectionate friendship. It was a privilege to know him, and an honor to have enjoyed his esteem.

I have had some acquaintance by intercourse and by study with the public men of North Carolina. It has seemed to me that in some respects Mr. Davis and Judge Gaston approached each other. Mr. Davis was apparently the more accomplished and, perhaps, was more richly endowed by nature, and was the more studious to excel, doing superbly whatever he undertook. Judge Gaston had perhaps the more incisive mind, and was more given to reflection.

They were each, alike, crowned by virtue and may justly be regarded as among the most illustrious of North Carolinians; but a parallel cannot well be drawn between them. Except the slight disturbance of 1812-14, and the internal differences that were cured in 1835, Judge Gaston's voyage of life was through placid waters; while Mr. Davis lived through a period of storm, of heroic struggle, of calamity,—when devotion exalted the soul of the patriot, and the iron in a true man, by the alchemy of a fiery furnace, was turned to burnished steel and became resplendent in the sunlight of heaven.

It is the portrait of this Carolinian, eminent for his virtues and for his learning, lofty in his ideals, of high merit in the field of literature, magnificent in oratory, great in his thoughts, and great in his performance, who filled his appropriate place among the chiefest men of the Confederacy, and was so schooled to duty that he could, at its call, relinquish a noble ambition—to sit here, in the seat of the mighty, and write his name imperishably in the jurisprudence of his native State—it is the portrait of this illustrious man and distinguished member of the bar of this Court that I am commissioned to ask your Honors to accept.

It was painted by Mr. Busbee of this city; and those who have seen it agree with me that it is a good representation of Mr. Davis, lacking, perhaps, in some lights, a certain sweetness of expression that I used to find in his kindly face, but certainly worthy of admiration for its excellence.

I beg that your Honors will accept it and will order that it be preserved on your walls, in association with the portraits of the other eminent men that are so worthily preserved here.

ACCEPTANCE BY CHIEF JUSTICE CLARK

Chief Justice CLARK, in accepting the portrait, said:

It gives the Court peculiar pleasure to receive the portrait of Honorable George Davis. He was one of the ablest men and most distinguished lawyers not only of this State, but of the South. He was a product of the great Cape Fear section, that land of the cypress and the pine, which has contributed so greatly to the history of North Carolina in eminent men and great deeds.

This portrait from the brush of a North Carolina artist, Mr. Busbee, most appropriately has been presented by an eminent historian, himself a native son of the Cape Fear.

North Carolina had two representatives in the Cabinet of the Confederate States, both of them Attorney-General—Thomas Bragg and George Davis. This State has had five members of the United States Cabinet, all of them Secretaries of the Navy—Branch, Badger, Graham, Dobbin, and Daniels. In the Confederacy that existed during the Revolution and up to the adoption of the Constitution in 1787, we had as our representative the Chairman on Naval Affairs, Joseph Hewes, who at the instance of Wilie Jones appointed Paul Jones to the United States Navy.

It also happens that three native-born citizens of this State—Jackson, Polk, and Johnson—became Presidents of the United States, and all of them when elected were citizens of Tennessee.

Much of this was, of course, merely coincidence, but it may be that, in part, at least, it is significant of the great conservatism of our State, which, when it has once adopted an idea or plan, continues along that line. Thus these things may be characteristic and not merely accidental.

North Carolina and our profession will always revere the memory of Mr. Davis. He was a lawyer of the highest ability, a patriot without personal ends to serve, and a citizen whose character was without spot. His portrait is most welcome to these halls, and the Marshal will hang it in its appropriate place in the Library of the Court.

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.

ABATEMENT. See Nuisance, 4.

ACCESSORY. See Criminal Law, 18.

ACCOUNTING. See Estates, 2.

ACTIONS. See Deeds and Conveyances, 28; Receivers, 1; Statutes, 2, 3; Usury, 2.

ADDITIONAL SERVICES. See Attorney and Client, 1.

ADMISSIONS. See Evidence, 7, 27; Pleadings, 9.

AFFIDAVIT. See Injunction, 1.

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AMENDMENTS. See Commerce, 2; Criminal Law, 8; Master and Servant, 7, 8, 9; Parties, 2; Pleadings, 5, 7, 8.

APPEAL. See Corporation Commission, 1; Drainage Districts, 8; Roads and Highways, 1.

APPEAL AND ERROR. See Municipal Corporations, 19; New Trial; Parties, 1; Pleadings, 7, 8; Process, 1; Reference, 1, 2; Removal of Causes, 6; Trials, 1, 4, 5, 6, 7; Wills, 9, 11, 12, 19; Courts, 7; Criminal Law, 23; Homicide, 23; Indictment, 5; Instructions, 7, 8.

1. *Judgments — Excusable Neglect — Findings — Evidence — Appeal and Error.*—The findings of the trial judge in setting aside a judgment thereon for excusable neglect are reviewable on appeal when not supported by the evidence. *Lumber Co. v. Blue*, 1.

2. *Same—Case Remanded.*—Where the trial court has set aside a judgment for excusable neglect, finding that summons had been read to defendant, who had forgotten it because of disease; that the judgment had thereafter been obtained by default of an answer in the course and practice of the courts, and it appears that the defendant was a man of large business interests, a director in a bank, daily attending to his affairs, the case will be remanded for further findings in order that it may more definitely appear in what respect or to what extent the impaired physical condition of the defendant affected his memory, so that the Supreme Court may more intelligently pass upon the question presented. *Ibid.*

3. *Appeal and Error—Pleadings—Trials—Nonsuit.*—Where the complaint states no cause of action, a judgment of nonsuit may be entered in the Supreme Court. *Crotts v. Winston-Salem*, 24.

APPEAL AND ERROR—*Continued.*

4. *Appeal and Error—Fragmentary Appeals—Final Judgment.*—An appeal is premature and will not lie from an order that the sheriff hold the proceeds of sale of a horse and buggy, seized under the "Search and Seizure" Act of 1915 to await final judgment, the case appearing to be heard upon a case agreed to test the validity of the act. *Richardson v. Hobgood*, 37.

5. *Same—Costs—Appeal and Error.*—Where the sale under a power thereof will be enjoined upon payment into court of the balance due on the first and only matured note, the costs will be taxed against the mortgagor having the sale enjoined, including the cost of judgment, the mortgagee having the right to sell at the time; and in this case the judgment being modified and affirmed on appeal, the costs thereof are taxed against the mortgagor, the plaintiff. *Frink v. Tyre*, 41.

6. *Appeal and Error—Several Parties—Nonsuit—Erroneous as to One.*—Where a judgment as of nonsuit upon the evidence has erroneously been granted to the prejudice of several of the parties, but appealed from by only one of them, it will be set aside on appeal as to all. *Brown v. Harding*, 253.

7. *Appeal and Error—Costs.*—In this case the plaintiff's recovery was resisted by both defendants, denying the validity of the plaintiff's judgment, sought by him to be enforced, and a nonsuit in favor of one of the defendants having been set aside, the costs on appeal will be equally paid by both. *Ibid.*

8. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* The Supreme Court on appeal will not consider error assigned for the ruling out of unanswered questions, unless it appears in some recognized manner what the answers would have been, or shown that the appellant had been prejudiced thereby. *Jenkins v. Long*, 269.

9. *Same—Evidence—Matters at Issue.*—Where damages are sought for injury to an employee by the caving in of a ditch where he was at work, and there is evidence that the depth at which he was digging would require bulkheads for safety in soil of a certain character, an unanswered rejected question assuming the character of the soil will not be considered as error on appeal, as the question assumed a matter for the determination of the jury. *Ibid.*

10. *Appeal and Error—Rules of Court—Pauper Appeals—Briefs—Records.* An appeal to the Supreme Court will be dismissed if the appellant fails to comply with the new rules of practice therein, requiring that appellant, in pauper appeals, when docketing the appeal, shall file six typewritten copies of the record, including case on appeal and briefs; and that the brief of the appellant be prefaced by a clear and concise statement, showing the nature of the case and the facts bearing upon the assignments of error; and this is required whether the appellant may have received notice of the rule from the Supreme Court clerk or not. *Estes v. Rash*, 341.

11. *Appeal and Error—Exceptions—Briefs.*—Exceptions not mentioned in the appellant's brief are taken as abandoned. Rule 34. *Campbell v. Sigmon*, 348.

12. *Appeal and Error—Case Agreed—Time—Judgments in Term—Signature of Judge—Rendered Out of Term—Statutes.*—It is not required

APPEAL AND ERROR—*Continued.*

that a judgment rendered in term be signed by the judge, and where the parties agree to an extension of time to serve case countercase or exceptions on appeal from a judgment thus rendered, the time must be computed for serving appellant's case from the end of the term, and not from the time the judgment was actually thereafter signed under an agreement that the judge should do so. Instances where the judgment is rendered out of time have no application. Revisal, sec. 559. *Land Co. v. Chester*, 399.

13. *Appeal and Error—Prejudicial Error.*—Mere error in the trial of a cause will not induce the Supreme Court to order a new trial; for it should reasonably appear that the error was prejudicial to the appellant's right and that the new trial sought would result differently, if ordered. *Schas v. Assurance Society*, 420.

14. *Appeal and Error—Negligence—Error as to One Issue—Prejudicial Error—New Trial as to All Issues.*—The plaintiff, a passenger in an automobile, was injured by a locomotive striking the car as the driver was attempting to cross the track at a public crossing. Under the evidence the court properly submitted the issue to the jury whether the defendant's engineer gave proper signals or warnings of the approaching train, but erroneously submitted for their determination the question of whether obstructions on the track caused the injury alleged: *Held*, the error committed was prejudicial to defendant and reversible, and a new trial is ordered on all of the issues. *Hunt v. R. R.*, 442.

15. *Appeal and Error—Brief—Exceptions Abandoned.*—Exceptions not mentioned in appellant's brief are deemed abandoned. *McCurry v. Purgason*, 463.

16. *Appeal and Error—Verdict—Instructions—Harmless Error.*—The verdict of the jury on an issue in appellant's favor cures an error in the court, if any committed, in refusing to give a requested instruction on that issue. *Hopkins v. R. R.*, 485.

17. *Appeal and Error—Rules Supreme Court—Printed Records.*—Rule 29, as to the size, style, type, etc., of transcripts on appeal, is for the purpose of preserving them in bound volumes of uniform size, for the use of the Court, and must be complied with. On this appeal the appellant is not permitted to recover the cost of his transcript and brief which are not printed in compliance with the rule. *Howard v. Tel. Co.*, 495.

18. *Appeal and Error—Former Appeal—Second Appeal—Different Parties.* Where the Supreme Court has decided the matters presented on appeal by some of the parties interested in the controversy, other parties thereto may not prosecute a second appeal from the application by the referee of the principles formerly passed upon, for the former decision is the law of the case and cannot be reviewed on a second appeal. *Hogsed v. Lumber Co.*, 529.

19. *Appeal and Error—Registration—Damaged Records—Immaterial Evidence.*—In an action to recover lands, certain pages of the registration books, admitted to be genuine, were put in evidence to aid the description of the lands described in a deed in the plaintiff's chain of title, and testimony, over the defendant's objection, was admitted that during the Civil War the then register of deeds had hidden the books under a log he afterwards had difficulty in finding, and that the book

APPEAL AND ERROR—*Continued.*

was damaged. Under the circumstances of this case the admission of the evidence is held as immaterial. *Smathers v. Jennings*, 601.

20. *Appeal and Error—Objections and Exceptions—Scope of Objections.*—Objections to the introduction of State grants in evidence in an action involving title to lands, upon the ground that they are not and do not purport to be grants or abstracts of grants, not having been signed by the Governor, cannot be enlarged on appeal so as to include an objection that they have not been properly registered. As to whether the objection in this case is aptly taken, *Quœre. Herbert v. Development Co.*, 622.

21. *Appeal and Error—Reference—Exceptions.*—Where a conclusion of law of a referee upon the facts found by him has been overruled by the trial judge, and no exception thereto has been taken by the appellant, he may not be heard to complain on appeal. *Hannah v. Hyatt*, 634.

22. *Appeal and Error—"Moot Case"—Intoxicating Liquors—Carriers of Goods.*—The purpose of this action being to determine the question whether the plaintiff, the consignee of a keg of beer, transported by the defendant carrier from beyond the State, is entitled to receive it in North Carolina; and it further appearing from the briefs filed that both the parties to the suit are interested on the same side of the controversy, and that the State and Federal statutes require interpretation: *Held*, the case is practically a "moot case," which, under the circumstances, the Court will not decide. *Kistler v. R. R.*, 666.

23. *Appeal and Error—Broadside Exceptions—Objections and Exceptions.* In an action to recover a balance of salary alleged to be due by contract, an exception to the judge's charge that he failed to properly instruct the jury as to the weight and effect of the contract is held to be a broadside exception which the Supreme Court will not consider on appeal. *Howerton v. Scherer*, 669.

24. *Appeal and Error—Substantial Rights—Alimony—Attorney's Fees—Pendente Lite—Interpretation of Statutes.*—An appeal from an order allowing alimony and counsel fees to the wife *pendente lite* is permitted under the general laws regulating appeals (Revisal, sec. 587), making it unnecessary to bring section 15, ch. 39 of the Revised Code forward, specially permitting appeals in such cases. *Garsed v. Garsed*, 672.

25. *Appeal and Error—Objections and Exceptions—Unanswered Questions.* The exclusion of evidence tending to show the right of the defendant electric company to haul freight over its lines, in these proceedings upon the question of damages recoverable by the owner of lands for a right of way condemned thereover, was proper under the former decision in this case. 162 N. C., 504. *Land Co. v. Electric Co.*, 674.

26. *Appeal and Error—Injunction—Act Committed—Appeal Dismissed.*—On appeal from an order dissolving an order restraining county commissioners from appointing county registrars and judges of election to conduct an election previously called, it was properly made to appear that the election had been held; and there being nothing before the court for it to determine, the appeal is dismissed. *Cannon v. Comrs.*, 677.

27. *Appeal and Error—Assignments of Error—Rules of Court—Appeal Dismissed.*—Assignments of error must conform to the rules of the Su-

APPEAL AND ERROR—*Continued.*

preme Court on appeal, so that the Court can see what error, if any, has been committed; and upon failure to do so the Court may, of its own motion, dismiss the appeal. *Thresher Co. v. Thomas*, 680.

28. *Appeal and Error—Remanding Cause—Disputed Facts.*—In this controversy over a disputed title to lands, involving the identity of a grantor in certain deeds with the plaintiff in a judgment, which is necessary to the plaintiff's chain of title, which is disputed on appeal, the case is remanded in order that the fact be determined. *Evans v. Brendle*, 681.

29. *Instructions Requested—Erroneous in Part—Appeal and Error.*—Where a part of a requested instruction is erroneous, it is not error for the trial judge to reject the whole. *S. v. Hand*, 703.

30. *Appeal and Error—Unsupported Assignment—Record.*—A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. *S. v. Freeze*, 710.

31. *Appeal and Error—Exceptions After Verdict.*—As to whether under the circumstances of this case it was improper or prejudicial to the defendant for the judge to have asked counsel if they desired to address the jury, *quœre.* But exception thereto taken after verdict comes too late. *S. v. Randall*, 757.

32. *Appeal and Error—Assault—Deadly Weapon—Question of Law—Harmless Error—Criminal Law.*—As to whether a weapon used in making an assault is *per se* a deadly weapon may depend upon its size and character, the manner of its use, the size and strength of the person using it, and the person upon whom it is used; and the trial judge in this case, wherein a rock the size of a man's fist was used, having submitted the question to the determination of the jury, under correct instructions, any error he may have committed in not holding the rock to be a deadly weapon as a matter of law is cured by an affirmative finding of the jury. *S. v. Beal*, 764.

33. *Appeal and Error — Confessions — Evidence Restricted—Objections.*—Objection that a confession made by one charged with a capital offense was not voluntary will not be reviewed on appeal when the trial judge has otherwise found as a fact and there is evidence to support the finding. The evidence in this case is held sufficient. *S. v. Christy*, 772.

APPEARANCE. See Criminal Law, 9; Pleadings, 11.

ARGUMENTS OF LAW. See Attorneys, 1; Trials, 5.

ARREST. See Malicious Prosecution, 2.

1. *Assaults—Arrests—Warrants—Officers—Criminal Law.*—An officer of the law authorized to make arrests for its violation is not required to show his warrant for the arrest if he is known as such to the person being arrested by him. *S. v. Beal*, 764.

2. *Arrest—Resisting Officer—Assault—Justification—Criminal Law.*—An officer having a warrant for the arrest of an alleged offender was temporarily without his warrant when the arrest was made, and the

ARREST—*Continued.*

offender, without requiring that the warrant be shown him, went along peaceably and without resistance; but his brother, running up, demanded that the warrant be shown, and this not being done, he struck the officer with a rock the size of his fist and knocked him down. *Held*, the brother in thus making the assault acted without legal excuse or justification. *Ibid.*

ARREST OF JUDGMENT. See Criminal Law, 10.

ARSON. See Criminal Law, 19; Indictment, 4, 5.

ASSAULT. See Homicide, 1, 27, 28, 29, 38; Appeal and Error, 32; Arrest, 1, 2.

ASSESSMENTS. See Drainage Districts, 1, 4; Municipal Corporations, 1, 2, 3, 6.

ASSIGNMENT. See Judgments, 10.

ASSIGNMENT OF ERROR. See Appeal and Error, 2, 7.

ASSUMPTION OF RISKS. See Master and Servant, 11.

ATTORNEY AND CLIENT. See Judgments, 15.

Attorney and Client—Additional Services—Implied Promise to Pay—Trials—Questions for Jury.—Where an attorney has obtained judgment in favor of his client upon an agreed fee, and in writing therefor he states that the judgment debtor has land in an adjoining county, and in view of the largeness of the amount involved he had deemed it expedient to have the judgment recorded in the adjoining county, though not necessary, which he had done, and thereafter the judgment debtor, in making a sale of the land to a stranger, was compelled to pay the amount of the judgment in full, which the attorney received, but in transmitting it to his client retained a commission of a certain per cent upon the amount collected as a further fee for additional services rendered, in an action by the creditor to recover the fee retained, it is held as reversible error for the trial judge to submit only one issue, as to the value of the services rendered upon an implied promise to pay, it being first necessary for them to determine an issue as to whether the further services were rendered with the intent of both parties that there should be no charge therefor. *Guano Co. v. Bennett*, 343.

ATTORNEYS.

Trials—Attorneys—Arguments of Law.—It is reversible error for the trial judge not to permit attorneys to argue the law to the jury and to apply therein the decisions of the Court (Revisal, sec. 216); though the facts may not be read in evidence. *Howard v. Tel. Co.*, 495.

ATTORNEY'S FEES. See Appeal and Error, 2, 4; Insurance, 14; Divorce.

AUDITORS. See County Commissioners, 1, 3; Mandamus, 1, 2.

AUTOMOBILES. See Railroads, 9.

BANKRUPT. See Vendor and Purchaser.

BANKRUPTCY.

1. *Bankruptcy—Trustee's Title—Purchaser for Value—Registration—Notice—Interpretation of Statutes.*—Since the amendment to the Bankrupt Act of 1910 the trustee of a bankrupt acquires the bankrupt's property on the same basis as creditors and purchasers for value against unrecorded instruments; and where the lands have theretofore been conveyed to the bankrupt to be held in trust for himself and another purchaser, the title taken to himself, and he had forwarded a deed to the other person for his part of the lands, but which deed was not received or recorded, the purchaser at the trustee's sale acquires a good title, though he was aware of the previous transaction. *Lynch v. Johnson*, 110.

2. *Bankruptcy—Unlawful Preference—Insolvency—Issues.*—To constitute an unlawful preference given to a creditor under the bankrupt act, it requires that the bankrupt be insolvent at the time the preference was given; that it was given within four months before the filing of the petition in bankruptcy, and that the person receiving such preference shall have had reasonable cause to believe that a preference was intended; and while, in a trustee's action to establish that such preference had been given by the bankrupt to one of his creditors, it is better for the court to submit a separate issue as to the insolvency of the bankrupt at the time of the alleged transaction, it is *held*, in this case, that the jury's answer to the issue submitted is determinative of the controversy in all of its essential elements, under a clear and comprehensive charge of the court. *McNeeley v. Shoe Co.*, 278.

3. *Bankruptcy — Burden of Proof — Unlawful Preference — Insolvency—Partnership.*—The trustee in bankruptcy has the burden of proving that a transaction between the bankrupt and his creditor was an unlawful preference under the act, not that there was an intent to defraud, but an intent to prefer; and where the bankrupts are partners in business the bankruptcy of one at the time of the transaction is not sufficient, for, as each partner is liable for the firm's debts, the insolvency of all must be shown. *Ibid.*

4. *Bankruptcy — Unlawful Preference — Insolvency—Imputed Knowledge —Inquiry.*—It is not necessary that a creditor dealing with a bankrupt should have known of his insolvency at the time of receiving a preference, for it is sufficient if he knew of such facts which would have put a reasonably prudent man upon inquiry which would have revealed to him that the transfer by the bankrupt was unlawfully preferable in its effect. *Ibid.*

5. *Issues Tendered—Duty of Counsel—Issues Submitted—Sufficiency.*—Counsel should prepare such issues as he thinks arise from the pleadings and are proper to be submitted, and he may not object to those prepared and submitted by the court, when they are sufficient, under his charge, to a proper determination by the jury of all the matters relative to the inquiry. *Ibid.*

BANKS AND BANKING.

Banks and Banking—Cashier—Principal and Agent—Bills and Notes—Release of Liability—Consideration—Ultra Vires Acts.—There is no implied authority given to a cashier of a bank, by virtue of his office, to release, without consideration, one of the joint makers from his liability on a note given to the bank; and when it is shown that the

BANKS AND BANKING—*Continued.*

cashier agreed that if one of the two makers of a partnership note paid a certain amount upon a well-secured note given by the other individually to the bank, such other maker would be released from all liability on the joint note sued on, the transaction is without consideration and the bank is not bound thereby. *Bank v. Lennon*, 10.

BILLS AND NOTES. See Banks and Banking, 1; Pleadings, 9; Usury, 1.

1. *Bills and Notes—Negotiable Instrument—Holders—Fraud in Procurement—Burden of Proof.*—Where fraud in the procurement of a note has been shown in an action brought by one claiming to be a holder in due course, the burden of proof is on the plaintiff to show that he acquired the paper before maturity, in good faith for value, without notice of any infirmity or defect in the title of the person negotiating it, and upon his failure to do so it sets aside the contract in its entirety, including, in this case, a stipulation that the maker will return the stallion for which the note was given, if not as warranted, and receive another of equal value. *Robinson v. Huffstetler*, 165 N. C., 464, cited and distinguished. *Wilson v. Lewis*, 47.

2. *Same—Trials—Issues.*—Where a note given for a stallion is sued on by one claiming as holder in due course and the jury has rendered a verdict upon which the note was invalidated for fraud, an issue as to the indebtedness of the defendant for the horse does not arise. *Ibid.*

3. *Bills and Notes—Negotiable Instruments—Indorser—Presumptions—Holder—Interpretation of Statutes.*—One placing his signature on the back of a negotiable paper is deemed an indorser thereof, and under the express terms of the statute should "clearly indicate by appropriate words his intention to be bound in some other capacity," when such exists, in order for him to avail himself thereof as a defense in an action brought by a holder in due course. *Myers v. Battle*, 168.

4. *Bills and Notes—Corporations—Treasurer—Indorser—Presentment for Payment—Dishonor—Notice.*—Where the treasurer of a corporation indorses the corporate note, payable at a certain bank, and at its maturity the corporation has no funds at the bank: *Held*, it is not necessary, in an action upon the note by a holder in due course against the indorser, that the note should have been presented to the bank for payment, or that the treasurer indorsing it, being fixed with notice of the insolvency of the maker, should have had notice of dishonor. *Ibid.*

5. *Bills and Notes—Negotiable Instruments—Fraud—Holder in Due Course—Burden of Proof.*—Where it is established that the draft and acceptance sued on was procured by the original payee by falsely and fraudulently representing the character of wares or merchandise—the grade of cotton, in this case—for which it was given, an intervenor in the action, claiming the instrument as a holder in due course, has the burden of proving that he paid full value for the draft and that he was a *bona fide* purchaser, before maturity and without knowledge of the infirmity. *Latham v. Rogers*, 239.

6. *Bills and Notes—Indorsements—Holder in Due Course—Prima Facie Case—Purchaser for Value—Burden of Proof—Appeal and Error.*—Where there is neither allegation nor proof that the title to a negotiable instrument is defective (Revisal, sec. 2208, 2204), the holder thereof by indorsement is only required to prove the indorsement for

BILLS AND NOTES—*Continued.*

him to be deemed *prima facie* a holder in due course (Revisal, sec. 2208); that is, he is *prima facie* a purchaser in good faith for value, before maturity, and without notice of any infirmity in the instrument, or of any defect in the title of the person negotiating it; and where such holder has shown such indorsement of the instrument sued on it is reversible error for the trial judge to charge the jury that the burden of proof is on him to prove by his evidence, other than by the presumption, that he had paid value for the instrument. *Moon v. Simpson*, 335.

BILLS OF LADING. See Carriers of Goods, 3; Commerce, 1, 13.

BLIND TESTATOR. See Wills, 17.

BONDS. See County Commissioners, 5; Drainage Districts, 1; Elections, 1, 2; Road Districts, 1; Roads and Highways, 2.

BOUNDARIES. See Deeds and Conveyances; Evidence, 25.

BREACH. See Contracts, 5, 12.

BRIEFS. See Appeal and Error, 10, 11, 15.

BURDEN OF PROOF. See Bankruptcy, 3; Bills and Notes, 1, 5, 6; Estates, 3; Homicide, 3, 4, 5; Insurance, 6; Trials, 3; Trusts, 1; Wills, 12, 20, 21.

BURDEN OF THE ISSUE. See Trials, 3.

CANCELLATION. See Vendor and Purchaser, 2.

CARRIERS. See Carriers of Goods; Carriers of Passengers; Commerce, 1.

CARRIERS OF GOODS. See Appeal and Error, 22; Commerce, 6; Carriers of Passengers; Railroads; Common Carriers.

1. *Carriers of Goods—Live Stock—Bills of Lading—Damages—Written Notice—Waiver.*—Stipulations in bills of lading covering shipments of live stock, requiring written notice of claim for damages to be given before the stock is removed from the possession of the carrier, are valid; but the requirement that the notice shall be in writing is waived upon proof of the carrier's knowledge of the injury; as, in this case, where the consignee called the attention of the carrier's agent at the point of destination to the damage done, when the stock in the carrier's possession was being unloaded, and paid the freight and took them away under an agreement that the matter should later be taken up between them. *Baldwin v. R. R.*, 12.
2. *Same—Discrimination.*—The rule that the carrier's knowledge of damages done to a shipment of live stock while in its possession waives the stipulated requirement of its bill of lading, that written notice thereof be given to the carrier before taking the stock from its possession, applies alike to all carriers and persons dealing with them, and is not a discrimination against or in favor of any one. *Ibid.*
3. *Carrier of Goods—Open Bill of Lading—Ownership of Goods—Presumptions—Evidence.*—The consignee of a shipment of goods is regarded as the owner thereof when received by the carrier under an open bill of lading given therefor to the consignor, without anything to indicate to the contrary, and in an action by the latter to recover

CARRIERS OF GOODS—*Continued.*

damages to the shipment, such paid bill of lading alone is no evidence of the ownership by the consignor of the goods, the presumption being that the consignee paid it, and upon the evidence the consignor cannot recover. *Ellington v. R. R.*, 36.

4. *Carriers of Goods—Penalty Statutes—Consignor Aggrieved—Filing Claim—Origin of Shipment.*—A consignor of a shipment of goods is required by the statute to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within ninety days, etc. Revisal, sec. 2634. *Grocery Co. v. R. R.*, 241.

5. *Carriers of Goods—Damages—Penalties—Consignee Named—Consignee Aggrieved—Husband and Wife—Principal and Agent—Undisclosed Principal.*—Where the consignee of a shipment of goods by a common carrier is not the owner thereof, but is acting as his undisclosed agent, the actual owner is the "consignee aggrieved" under the provisions of Revisal, sec. 2634, and may recover the penalty in an action against the carrier for failure to pay for damages to the shipment within the time and under the conditions specified in the statute. And this construction applies when the wife is the real owner and the husband is named as the consignee in the bill of lading. *Horton v. R. R.*, 383.

6. *Carriers of Goods—Damages—Penalties—Consignee Aggrieved—Undisclosed Principal—Estoppel.*—Where the undisclosed real owner as consignee in a shipment of goods by a railroad company remains silent and permits the consignee named in the bill of lading to recover the penalty prescribed by Revisal, sec. 2634, for failure to pay damages thereto, he is estopped to proceed against the carrier for the same recovery. *Ibid.*

7. *Carriers of Goods—Overcharges—Evidence—Rates for Different Routing—Trials—Nonsuit.*—The burden is upon the plaintiff to show that a freight rate charged and collected by the carrier on an interstate shipment was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the State statutory penalty; and where the shipment has been routed over one line of connecting carriers and the tariff filed by the carrier over another route is shown, it affords no evidence as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit should be granted. *Hardware Co. v. R. R.*, 395.

8. *Carriers of Goods — Corporation Commission — Regulations — Written Notice to Consignee—Waiver.*—The regulation of the Corporation Commission requiring that the carrier mail written notice upon arrival of a shipment may be waived by the conduct of the consignee, as, in this case, where his managing agent and a drayman, customarily hauling his goods from the depot, were both notified of their arrival, and the former, stating that he did not then need the goods, left them in the depot warehouse awaiting a bill of lading for them. *Hemphill v. R. R.*, 454.

9. *Carriers of Goods—Notice to Consignee—Warehousemen—Negligence—Instructions—Reversible Error.*—Where a railroad depot warehouse is destroyed by fire, causing the loss of a shipment of goods left in the warehouse after notice of arrival to the consignee, and for the

CARRIERS OF GOODS—*Continued.*

consignee's convenience, the latter, in order to recover in his action, must show by a preponderance of evidence that the defendant was guilty of negligence which was the proximate cause of the injury, and a charge of the court that puts upon the carrier the burden of an insurer, in such instances, and not of a warehouseman, is reversible error. *Ibid.*

CARRIERS OF PASSENGERS. See Carriers of Goods; Railroads; Common Carriers.

1. *Carriers of Passengers—Street Railways—Crossties—Right of Way—Negligence—Evidence.*—Crossties left on the right of way of a power transportation company which had been repairing its railway track afford no evidence of negligence in an action to recover damages of the company for a personal injury alleged to have been inflicted in consequence thereof. *Foard v. Power Co.*, 48.
2. *Carriers of Passengers—Street Railways—Pedestrians—Crossing Track—Place of Safety—Contributory Negligence.*—Where a pedestrian using the track of a railway company is in a place of safety and seeing a rapidly moving car approach about fourteen feet away, and knowing the danger, attempts to cross the track and is injured, the rule requiring the employees on the car to give warnings of its approach has no application, and there being no evidence of the company's negligence, the contributory negligence of the pedestrian bars his recovery in an action for damages against the company. *Ibid.*
3. *Carriers of Passengers—Street Railways—Contributory Negligence—Nonsuit.*—Where it appears by the plaintiff's own evidence, in his action to recover damages for a personal injury he alleges to have been inflicted on him by the defendant's negligence, that the proximate cause of the injury was the contributory negligence of the plaintiff, a judgment as of nonsuit thereon is proper. *Ibid.*
4. *Same—Children—Evidence.*—The rule that the contributory negligence will bar the right of recovery of one who knowingly leaves a place of safety and attempts to cross a car track in the face of danger, and is injured by a rapidly moving street car, which he, at the time, saw about fourteen feet away, applies to children eleven years of age who are shown to have been intelligent, were accustomed to ride on the cars and evidently appreciated the danger in taking such risks. *Ibid.*

CASE AGREED. See Appeal and Error, 12.

CASE REMANDED. See Appeal and Error, 2.

CERTIFICATES. See Wills, 29.

CHIEF OF POLICE. See Criminal Law, 1.

CHILDREN. See Carriers of Passengers, 4; Wills, 1, 26.

CITIES AND TOWNS. See Injunction; Municipal Corporations, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23.

CLAIM AND DELIVERY. See Intoxicating Liquors, 1, 2.

CLERKS OF COURT.

1. *Clerks of Court—Receivers—Official Bonds—Sureties' Liability—Courts.* Where lands are ordered to be sold and the court appoints the clerk

CLERKS OF COURT—*Continued.*

of the court by name and official capacity as such to sell and to receive and invest the proceeds, without requiring bond, the clerk acts officially in regard to such duties, and the sureties on his bond as clerk of the court are liable for his failure to properly discharge the duties of his trust. *Hannah v. Hyatt*, 634.

2. *Clerks of Court — Receivers — Orders of Court — Disbursements— Credits.*—Where the clerk of the Superior Court is ordered in his capacity as such to sell lands and invest and reinvest the proceeds, and makes payment of certain moneys under the further orders of the court, in pursuance of the management of the property, no personal liability attaches to the clerk in acting accordingly; and where it is established that such orders have been duly made, the failure to record them cannot prejudice his right. *Ibid.*

3. *Clerks of Court—Receivers—Orders of Court—Deposits—Interest.*— Where the clerk, under order of court, sells certain lands, and deposits the proceeds with a bank which paid 5 per cent on accounts deposited for six months, but no interest on checking accounts, and it appears that the clerk was required to check on this account under the further orders of the court, but made a special arrangement with the bank whereby he was to receive 4 per cent on this deposit, which was the best he could do, he is not chargeable with the 5 per cent interest paid by the bank on its time deposits. *Ibid.*

4. *Same—Two Funds.*—Where an officer of the court, ordered to sell land, deposit the proceeds in a bank at the largest rate of interest obtainable, has two funds so deposited, on one of which he can and on the other he cannot draw interest, and he is required to check on his account in the performance of his duties, which could have been done on either account, he is chargeable with the interest lost by his checking on the interest-bearing account. *Ibid.*

5. *Clerks of Court—Receivers—Commissions—Appeal and Error—Remanding Case.*—The clerk of the court being required to sell certain lands and invest the proceeds, etc., and it appearing that he had rendered services of value, with no indication of conversion, misapplication, or commingling of funds, it is held that he is entitled to his commissions in the settlement of the estate, though he is chargeable with certain interest that he may have received on the funds intrusted to him. Revisal, sec. 2773, relating to the commissions of the clerk, has no application to the facts of this case. *Ibid.*

CLOUD ON TITLE. See Equity, 3, 4.

COLOR. See Deeds and Conveyances, 9; Mortgages, 2; Registration, 1; Wills, 6.

COMMERCE. See Intoxicating Liquors, 3; Railroads, 16.

1. *Interstate Commerce—Live-stock Bill of Lading—Carriers—Connecting Lines — Intermediate Lines — Damages — Evidence — Presumptions— Trials—Questions for Jury.*—Interstate Commerce Act, and other recent amendments placing the entire regulation of interstate commerce under Federal control, and making the initial carrier liable for damages to a shipment of goods, does not relieve the intermediate or the delivering carrier of responsibility for its own negligence in damaging a shipment, or affect the decision of our State court in requir-

COMMERCE—*Continued.*

ing them to show which of the carriers, in a connecting line of carriage, is responsible when the goods are shown to have been received in good condition by the initial carrier and delivered at destination in bad condition by the final one, such information being peculiarly in the knowledge of the carriers, and otherwise depriving the injured party of his right to have the issue passed upon by the jury. *Mewborn v. R. R.*, 205.

2. *Interstate Commerce—Amendments—Jurisdiction—State Courts.*—The proviso in the Carmack amendment to the Interstate Commerce Law preserving to the interstate shipper any remedy or right of action he may have under existing law, has reference by interpretation to such rights and remedies as he may have under the law as it is recognized and enforced in the Federal courts, and may be adjudicated in the courts of the State having jurisdiction. *Ibid.*

3. *Interstate Commerce—Live-stock Bills of Lading—Stipulations—Damages—Written Notice—Waiver—Federal Decisions.*—The stipulation in a live-stock bill of lading requiring that notice in writing be given the carrier's agent at destination, of claim for damages to the animals shipped, before they are removed or mingled with other animals, may be waived by the carrier's agent at the delivering point; and our decisions to this effect, in the absence of controlling decisions of the Federal courts to the contrary, are reaffirmed under the facts and circumstances of this case, it appearing that the fact that the animals were badly and fatally injured was called to the attention of the final carrier's agent, and consignee requested by him to take the stock to his own barn where they could better be examined, without evidence that they were mingled with other animals. *Ibid.*

4. *Same—Discrimination.*—The principle of waiver by the agent of the stipulation in a live-stock bill of lading that written notice of claim for damages to the animals shipped be given him at destination, before the animals are removed from the carrier's possession or mingled with other animals, etc., as recognized and upheld by the decisions of our State courts, are not in contravention of the Federal laws prohibiting a preference being given among the users of common carriers. *Baldwin v. R. R., ante*, 12, cited and applied. *Ibid.*

5. *Interstate Commerce—State Regulation—Police Powers.*—The Webb-Kenyon law does not confer upon the States any right or power to regulate interstate commerce, for the act itself is a regulation thereof, and it is not objectionable for want of uniformity arising from the differences in the State laws regarding the question of intoxicating liquors. *Glenn v. Express Co.*, 286.

6. *Interstate Commerce—Carriers of Goods—Overcharges—Penalty Statutes — Federal Control.* — Under the Interstate Commerce act, as amended, Congress, in the exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and our statute (Rev., sec. 2643, 2644), imposing a penalty upon the carriers for collecting excessive rates for such shipments and refusing to repay them, is inoperative. *Hardware Co. v. R. R.*, 395.

7. *Interstate Commerce—Federal Interpretation—State Courts.*—The interpretation placed upon the Interstate Commerce act and the legal consequence of its enactment, by the Supreme Court of the United States, is controlling in the State courts. *Ibid.*

COMMISSIONS. See Clerks of Court, 5; Contracts, 13; Trusts and Trustees, 3.

COMMON CARRIERS. See Carriers of Passengers; Carriers of Freight; Railroads.

1. *Common Carriers—Places of Business—Invitation, Express or Implied —Safety of Patrons—Carriers.*—Common carriers and others who induce the public to come into their places of business by invitation, express or implied, owe to them the duty of using reasonable care to keep the premises in a safe condition, so that their patrons may not unnecessarily be exposed to danger. *Nicholson v. Express Co.*, 68.

2. *Same—Express Companies—Negligence—Trials—Questions for Jury.*— Where upon notice a patron of an express company, an elderly lady, has gone to the company's office to receive an express package, and in her action to recover damages there is evidence tending to show that to repair the floors therein the flooring had been removed in front of the door, and a bystander helped her across, but being detained, the sills had also been removed when she desired to leave, and the same person who had assisted her threw down a plank for her to cross, which she attempted to do, but went back, observing that the plank would break with her, within the sight and hearing of the agent and his clerk, about five feet off, but who paid no attention to her; whereupon she, being compelled to go home, again made the attempt to cross, but her foot slipped and she fell to her injury: *Held*, evidence sufficient upon the question of defendant's actionable negligence to take the case to the jury. *Ibid.*

CONDEMNATION. See Easements, 6; Instructions, 5; Issues, 3; Trials, 5; Railroads, 18.

Condemnation—Railroads—Measure of Damages—Unsightly Construction —Evidence.—The exception to the charge of the court in this case allowing damages to the land assessed for a right of way on account of the unsightliness of the street railway construction thereon is not sustained on appeal. *Land Co. v. Electric Co.*, 674.

CONFESSIONS. See Appeal and Error, 33; Murder, 13, 14, 15, 25.

CONFIDENTIAL RELATIONS. See Wills, 18.

CONSIDERATION. See Deeds and Conveyances, 20; Insurance, 6; Issues, 1; Limitation of Actions, 5; Reference, 1.

CONSIGNEE AGGRIEVED. See Carriers of Goods, 5, 6.

CONSPIRACY. See Homicide, 26.

CONSTITUTIONAL LAW. See County Commissioners, 1; Evidence, 16; Grants; Intoxicating Liquors, 4; Married Women, 1, 2; Municipal Corporations, 1, 2, 6, 9, 20, 21, 23; Roads and Highways, 1, 2, 3, 4; Intoxicating Liquors, 12.

1. *Constitutional Law—Legislative Powers—Back Taxes.*—The General Assembly has power to enact legislation authorizing collection of back taxes, and to enforce collection by appropriate actions in courts. *Wilmington v. Moore*, 52.

CONSTITUTIONAL LAW—*Continued.*

2. *Constitutional Law — Criminal Law — Verdict — Prisoner's Presence— Waiver.*—Where, on appeal from a conviction of larceny, error is assigned to the imposition of the sentence of the court, that neither the defendant nor his attorney was present at the rendering of the verdict, and had not been afforded opportunity to poll the jurors, as they were discharged, etc., it is *Held*, that to sustain the exception it is necessary that it be made to appear whether the absence of the appellant or his attorney was voluntary, for in felonies less than capital, and in misdemeanors, the right to be present may be waived by the conduct or acts of the accused. *S. v. Freeze*, 710.

3. *Constitutional Law—Police Powers—State Control—Federal Courts.*— The police power of a State is inherent in the State, and never having been granted to the Federal Government (IVth Amendment, Federal Constitution), and being in no wise curtailed by the XIVth Amendment to the Federal Constitution, the State laws and courts are not subject to review as to the form of indictment and the matters of criminal procedure. *S. v. Brown*, 714.

4. *Same — Intoxicating Liquors—Criminal Law — Indictment—Particular Persons Named.*—Laws 1913, ch. 44, sec. 6, relating to intoxicating liquors, and providing that in an indictment for violating the act "it shall not be necessary to allege the sale to a particular person," is constitutional and valid, and not in contravention of the Federal Constitution. *Semble*, it would not be necessary to charge the sale to a particular person in the absence of statutory provision. *Ibid.*

CONSTITUTIONAL, STATE.

ART.

IV, sec. 1. The distinction between legal and equitable matters is not abolished, and the principles of equity as to time, not being of the essence of a contract, does not apply to actions at law. *Makuen v. Elder*, 510.

VII, sec. 2. County commissioners may employ expert accountant and direct payment out of county funds without approval of county auditor, under public-local law. *Wilson v. Holding*, 352.

X, sec. 6. Before Martin Act, 1911, executory contract of married woman could not charge separate realty without privy examination. Damages now recoverable. *Warren v. Dail*, 406.

X, sec. 8. Sole conveyances of lands by husband conveys wife's homestead, but not right of dower. *Dalrymple v. Cole*, 102.

CONTINGENT LIMITATIONS. See Estates, 4.

CONTRACTS. See County Commissioners, 1; Courts, 4; Deeds and Conveyances, 8; Easements, 5; Instructions, 1; Insurance, 1, 2, 8, 14; Limitation of Actions, 5; Married Women, 1, 2, 3, 4, 5, 6; Pleadings, 6; Vendor and Purchaser, 1, 2, 3, 4, 5, 6, 7, 8.

1. *Evidence—Contracts—Subcontractor—Matters at Issue.*—The plaintiff sues the subcontractor of a railroad company for the amount due him under a contract to clear off a certain portion of the right of way, claiming a lien for the amount due from the principal contractor, and the amount of recovery was made to depend upon whether the plaintiff was to be paid by the defendant for clearing the total area or only such part as he actually cleared, at the stated price per acre. It is

CONTRACTS—*Continued.*

held, in this case, that the contract between the railroad and its subcontractor was directly put at issue, and was admissible in evidence for that and the further reason that it tended to establish the reasonableness of the plaintiff's contentions, in showing the amount allowed the defendant for this work. *Lefler v. Lane*, 181.

2. *Contracts, Written—Deeds and Conveyances—Parol Evidence—Statute of Frauds.*—A grantor, 84 years of age at the time, executed a conveyance of his land to his daughter, then living with him with her son, the deed being in fee and in the usual form, with a recited consideration and covenants and warranty of title. In this action to set aside the deed there was no allegation or proof of undue influence or fraud, but that grantor was tired of the presence of the son and made the conveyance as a device to get rid of him: *Held*, evidence of declarations made by the grantor two weeks before the execution of the deed, and made by him without reference to it, that he wanted to get rid of his grandson, was properly excluded, as a contradiction of the written instrument. *Campbell v. Sigmon*, 348.

3. *Contracts, Written—Parol Evidence—Declarations—Statute of Frauds.* Evidence of declarations of a grantor in a deed to lands, made after its execution, to show that he only intended the deed as a device to rid him of the presence of his grandson, and that he would get the deed back, is incompetent, as an attempt to contradict the written instrument by parol. *Ibid.*

4. *Contracts—Parol Guaranty—Statute of Frauds.*—The plaintiff leased a hotel from the owner, a corporation, with the privilege of purchase. Default being made, the property was sold. The plaintiff seeks, in his action, to hold the defendant liable on his oral statement that he and another were the owners of 95 per cent of the stock, and that he, the plaintiff, would not be interfered with, etc.: *Held*, the guarantee was void under the statute of frauds, Revisal, 974. *Gilmer v. Improvement Co.*, 452.

5. *Contracts of Sale—Breach—Verdict—Damages—Appeal and Error.*—The defendant corporation contracted to sell its hotel to the plaintiff, but was prevented from doing so by default and foreclosure of the mortgage: *Held*, under the circumstances of this case, the verdict of the jury, under the conflicting evidence, undisturbed by the trial judge, was conclusive on the amount stated. *Ibid.*

6. *Contracts—Interpretation—Ambiguity—Existing Conditions.*—In interpreting contracts, the intent of the parties as expressed in the entire instrument shall prevail, and where the contract is expressed in language sufficiently ambiguous to permit of construction, resort may be had in proper instances not only to the language employed, but to the nature of the instrument itself, the condition of the parties executing it, and the objects it had in view. *McMahan v. R. R.*, 456.

7. *Same—Easements—Railroads—Lessor and Lessee—Measure of Damages.*—A grant of a right of way for one purpose does not necessarily convey an easement for a different purpose imposing further burdens upon the land without additional compensation to the owner; and a lease of lands to a lumber plant, conferring the right to construct railroads thereon for its own purposes, will not be construed to give to the lessee the right to grant a railroad company the right to construct and operate its railroad or spur-tracks thereon, though advan-

CONTRACTS—*Continued.*

tageous to the lessee; and when such is done the owner has the present right of action against the railroad company for permanent damages to the land, the terms of the lease being considered as a circumstance relevant to the issue. *Ibid.*

8. *Contracts—Sale of Land—Principal and Agent—Guarantee of Agent—Liens.*—In a contract made for the platting of land in a town into lots and boosting the sale with a brass band, advertising and other methods, specifying how the expenses were to be proportioned between the parties, the defendant, whose business it was to make sales of this character, by express provision of article 3 of the contract, agreed to pay the plaintiff $8,000 on the day of the sale and half the amount the property would bring beyond that sum, and was to receive $300 as expenses, to be deducted from his part of the profits: *Held*, the payment of the $8,000 was a guarantee on defendant's part to which it was obligated, and the trial judge correctly directed its payment, and interest, into court, to be applied, in this case, by the clerk to the discharge of all liens on the land, and the balance to the plaintiff on his tendering to defendant an indefeasible deed to the property. *Barkley v. Realty Co.*, 481.

9. *Contracts, Duplicated—Change in Copy—Original Contract.*—Where the remainderman contracts that the lands shall be sold upon a contingent profit by another acting as sales agent, which was executed in duplicate, and he afterwards has the life tenants to sign his copy so as to bind them to the agreement, it is held that the alteration of this copy in the respect stated did not affect the original agreement as stated in the copy of the other contracting party; and further, that it was in furtherance of his interest and not prejudicial to it. *Ibid.*

10. *Contracts—Reformation—Evidence.*—In this action to reform a written contract for mutual mistake, the verdict of the jury establishing the contract as written is held to be supported by the evidence. *Ibid.*

11. *Contracts—Stipulations—Cessation of Liability—Waiver.*—Where by the valid terms of a contract the liability of a party thereunder has ceased, he will not thereafter be held to waive it by not asserting it, there being no right existent in him requiring it. *Makuen v. Elder*, 510.

12. *Contracts — Warranty — Breach — Pleadings — Evidence — Variance.*—Where the defendants set up a breach of warranty in an action upon contract to deliver a certain number of pounds of "14 single cotton warps" at a certain price per pound, and there is no evidence of express warranty, and the defendant admits the delivery and use of the "warps," evidence only tending to show unskilled workmanship in the manufacture of the "warps" and defects in their quality, without claim that they were worthless, does not support the allegation in the answer, and the counterclaim will be disallowed as a matter of law. *Robinson v. Huffstetler*, 165 N. C., 459, cited and applied. *Cotton Mills v. Mfg. Co.*, 670.

13. *Contract—Sales—Commmissions on Collections—Reference—Evidence—Appeal and Error.*—Where upon the report of the referee it appears that the plaintiff and defendant had contracted that the former should ship to the latter "galax," a known commodity of marketable value, for the latter to sell and remit the plaintiff moneys collected for such sales, less his part of the profits, and there is a conclusion of law

CONTRACTS—*Continued.*

charging the defendant with the full amount of the sales without evidence of the amount collected, an exception by the defendant to the confirmation of the report will be sustained on appeal, the defendant, under the terms of the contract, being chargeable only with the amount of sales collected, etc., and such as could have been collected by him by the exercise of ordinary diligence. *Hodges v. Richards*, 678.

CONTRIBUTORY NEGLIGENCE. See Carriers of Passengers, 3; Issues, 2; Judgments, 14; Master and Servant, 2, 15; Negligence, 10; Railroads, 3, 4, 5, 6, 7, 8.

CONVERSION. See Execution, 5; Levy, 1, 2.

Conversion—Equity—Claim and Delivery—Principal and Surety—Damages—Malicious Prosecution—Several Causes—Demurrer.—Where it is alleged that, in a former action, the defendants sued out claim and delivery, seized the plaintiff's property, in which the plaintiff has obtained final judgment in his favor, but that the defendant wrongfully, unlawfully, etc., had converted the property to his own use: *Held*, the plaintiff may recover his damages in an independent action against the defendant, and, *ex contractu*, against his sureties on his bond, and where the writ has been sued out willfully, maliciously, and wantonly, punitive damages against the principal defendant alone; but where the latter damages are sought against all in the same action, the causes should be severed, and a demurrer is bad. *Martin v. Rexford*, 540.

CONVICTS.

Convicts — Persons in Charge—Judgment—Clothing—Felony—Interpretation of Statutes.—In order to convict a superintendent of convicts, or other person in charge, of a violation of section 4, chapter 64, Laws 1911, making it unlawful to work persons convicted of felony in other than a uniform of a felon, or clothe a person convicted of a misdemeanor in the uniform of a felon, it is necessary that the judge imposing the sentence designate in the judgment whether the person was convicted of a felony or misdemeanor, or the kind of clothes the convict should wear; and where the judge has failed to do so, the one in charge of the person convicted is not indictable when the conviction is for manslaughter, though a well known felony, and the prisoner is not clothed in the garb required for one guilty of this offense. The rules for interpretation discussed and applied by WALKER, J. *S. v. Earnhardt*, 725.

COPIES. See Grants.

CORPORATION COMMISSION. See Carriers of Goods, 8.

Corporation Commission—Appeal—Parties—Appeal and Error.—Under the statutory proceedings upon petition to the Corporation Commission to require a railroad company to relocate its depot for the alleged convenience of petitioners of a certain town, the Commission decided with the defendant company, and upon appeal to the Superior Court that court dismissed the action, upon the ground that the petitioners were not such parties as to have acquired the right, the

CORPORATION COMMISSION—*Continued.*

statutes providing that the appeal be taken in the name of the State on relation of the North Carolina Corporation Commission, etc., and the present appeal being in the name of the Commissioners upon the complaint of the petitioners. In this appeal it is *Held*, that the action by the trial judge in dismissing the appeal was correct. *Corporation Commission v. R. R.*, 560.

CORPORATIONS. See Bills and Notes, 4; Receivers, 1; False Imprisonment. 1, 2.; Judgments, 1.

Receivers — Insolvent Corporations—Residence—Actions—Venue—Interpretation of statutes.—Where a receiver of an insolvent corporation resides in a different county from the concern he represents, and brings action to recover damages for breach of contract he has made, as such, with parties residing elsewhere in the State, the venue of the action is determined by the place of residence of the receiver and not necessarily by that of the insolvent corporation. Revisal, sec. 424. *Biggs v. Bowen*, 34.

COSTS. See Appeal and Error, 8; Liens, 1; Mandamus, 2; Trials, 2.

1. *Costs — Equity — Court's Discretion — Statutes.*—Under Revisal, secs. 1264 and 1266, allowing costs to the successful litigants, construed with section 1267, allowing the costs to be taxed in the discretion of the court unless otherwise provided by law, it is *Held*, that in actions under the old system peculiarly cognizable in courts of equity the costs shall be awarded in the discretion of the court under the provisions of Revisal, sec. 1267, unless within the class of actions specified in sections 1264 and 1266. *Yates v. Yates*, 533.

2. *Same—Mortgages—Foreclosure Sales—Injunctions.*—Where the main purpose of a suit is to restrain the sale of plaintiff's lands under mortgage, held and controlled by the defendant, and to have satisfaction of the mortgage entered of record, it is of an equitable nature; and where it has been judicially determined that the plaintiff owes a balance upon the mortgage debt, but time for redemption has been allowed, and provision made for the sale of the lands upon further default, etc., the taxing of the costs is within the reasonable discretion of the trial judge, and they are not recoverable by the defendant as a matter of right. Revisal, sec. 1267. *Ibid.*

COUNTIES. See Easements, 2, 4, 5.

COUNTY COMMISSIONERS. See Mandamus, 1; Road Districts, 1.

COUNTY COMMISSIONERS.

1. *County Commissioners — County Auditors — County Expenses — Contracts—Special Auditing—Approval by Auditor—Countersignature—Statutes—Constitutional Law.*—Revisal, sec. 1379, enacted in pursuance of the provisions of Art. VII, sec. 2, of our Constitution, giving the commissioners of a county a general supervision and control of its finances, invests the board with full power to direct the application of all moneys arising by virtue of ch. 25, "for the purposes therein mentioned, and to any other good and necessary purpose for the use of the county," and includes within its terms the right of the board, in its discretionary power, to contract with skilled expert accountants for the auditing of the books and accounts of the various

COUNTY COMMISSIONERS—*Continued.*

departments of the county at a price agreed upon, and empowers them to order that the same be paid by the county treasurer out of the county funds. *Wilson v. Holding*, 352.

2. *County Commissioners — Discretionary Powers — Courts.*—The courts cannot interfere with the exercise of the discretion of the boards of county commissioners in ordering an investigation by public accountants of the books of the various departments of the county government, authorized by Revisal, sec. 1379. *Ibid.*

3. *County Commissioners—County Auditor—Approval—Countersignature —Interpretation of Statutes.*—Various acts of the Legislature relating to the same subject-matter should be construed, when possible, so as to bring them into harmony with each other; and it is *held* that the Public-Local Laws of 1911, ch. 452, as amended by the act of 1913, ch. 306, creating the position of auditor for Wake County, to be appointed by the board, and, "under its control and discretion," and providing, among other things, that it shall "be his duty to audit all bills and claims presented to the board . . . and no claim or bill filed . . . shall be allowed or paid until it has been audited by the said auditor; and all warrants . . . shall be countersigned by him," should be construed in connection with Revisal, sec. 1379, giving the board of county commissioners control of the county finances, etc., and that, so construed, it does not take from the commissioners the power to contract, in their discretion, for a necessary county expense; though it is proper that the account be first referred to the county auditor for his investigation, approval and countersignature, under the direction of the statute. *Ibid.*

4. *County Commissioners—Injunction — Discretionary Powers — Public Roads—Courts—Statutes.*—The laying out and maintenance of the public roads or highways of a county are matters left largely within the discretion of the county commissioners, and, in the absence of express legislation to the contrary, they are not to be controlled by a vote of the localities affected, either informal or otherwise; and where it is shown that they have officially dealt with a question largely submitted to their judgment, their action may not be controlled or interfered with by the courts, unless it is established that there has been a gross or manifest abuse of their discretion, or it is made clearly to appear that they have not acted for the public interest, but in promotion of personal or private ends. *Edwards v. Comrs.*, 448.

5. *Same—Township Bonds—Improper Use—General Avertment.*—Where the county commissioners have acted within the powers conferred on them by ch. 122, Public Laws 1913, establishing a scheme for the laying out, establishing and maintenance, etc., of roads for the different townships therein, and have accordingly issued bonds and expended most of the money on the township roads, they may not be enjoined at the suit of the taxpayer from laying out and constructing an additional road, with the use of the money remaining on hand from the sale of the bonds, upon allegation, as to this particular road, that it was not for the public convenience, or that the majority of the voters were not in favor of it; and general allegation, without specific averment, that the commissioners were not acting for the public good, but for their own individual advantage, is insufficient to warrant the interference of the courts. *Ibid.*

COUNTY COMMISSIONERS—*Continued.*

6. *Same—Notice to Landowners—Suit by Taxpayers.*—The county commissioners will not be enjoined from building a public road in a township of a county from the proceeds of the sale of bonds issued by virtue of ch. 122, Public Laws 1913, at the suit of taxpayers, because notice had not been given to land owners along the route proposed required by Revisal, secs. 2684, 2685; for these statutes were enacted for the benefit of individual landowners, whose rights as such are not involved in a suit of this character. *Ibid.*

COURTS. See Parties, 2, 3; Pleadings, 5, 7, 8; Receivers, 1; Reference, 1; Removal of Causes, 2, 5, 6; Trusts and Trustees, 4; Vendor and Purchaser, 1; Wills, 20; Evidence, 28; Homicide, 23; Indictments, 3; Clerks of Court, 1, 3; Commerce, 2, 7; Costs, 1; County Commissioners, 2, 4; Criminal Law, 8; Deeds and Conveyances, 8; Insurance, 8; Judgments, 2, 3, 6; Judicial Sales; Master and Servant, 6, 7, and 8; Mortgages, 1; Municipal Corporations, 18.

1. *Courts—Jurisdiction—Trusts and Trustees.*—The Superior Court has jurisdiction to appoint new trustees for those named in a deed in trust of lands when necessary to preserve the trust estate, which may be done in an action asking for other relief. *Gold Mining Co. v. Lumber Co.*, 273.

2. *Courts—Wills—Advice—Appeal and Error.*—The courts will not entertain jurisdiction to construe a will merely to advise the parties as to the interests they will take thereunder. *Littleton v. Thorne*, 93 N. C., 71, cited and applied. *Reid v. Alexander*, 303.

3. *Court's Discretion—Verdict Set Aside—Separation of Jurors—Matters of Law—Appeal and Error.*—The trial judge, in his reasonable discretion, may set aside a verdict of the jury and refuse to find the facts upon which he does so and rest his judgment therein as a matter of law; and, it appearing in this case that he permitted the jury to separate during the trial without the knowledge or consent of the appellee, and has set aside the verdict after their motion and argument, on this ground, but within his discretionary powers, his action in so doing is not reviewable on appeal, it being for his determination whether the separation of the jury in any sense was prejudicial to the rights of the moving party, the appellee. *Settee v. Electric Ry.*, 365.

4. *Courts—Law and Equity—Equitable Principles—Contracts—Time as of the Essence.*—Our Constitution, Art. IV, sec. 1, providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinctions in the principles applicable to each; and an action to force the provisions of a contract, being one at at law, the equity that time is not the essence of the contract has no application. *Ibid.*

5. *Court's Discretion—Judgment Set Aside—Fair Trials—Appeal and Error.*—The granting of motions to set aside a verdict as being contrary to the weight of the evidence, and also to give the accused an opportunity to try his case before an unbiased and unprejudiced jury, rests within the discretion of the trial judge, and is not reviewable on appeal. *S. v. Hand*, 703.

6. *Court's Discretion—Separation of Witnesses—Witnesses Not Separated—Evidence.*—Where the court has ordered the witnesses separated

COURTS—*Continued.*

on the trial for a homicide, and permits a witness for the State to remain in the courtroom while the others were testifying, and then give his evidence, the act of the court in so doing is a matter within its discretion, and not reviewable on appeal. *S. v. Lowry*, 730.

7. *Courts—Expression of Opinion—Statutes—Appeal and Error.*—Where the prisoner is indicted for an assault upon an officer, and it appears that the assault was made while the officer was arresting another person, it is reversible error for the trial judge to charge the jury that the defendant would have been guilty of resisting an officer in the discharge of his duties had the indictment so charged, when the evidence is conflicting, for such is an intimation of opinion by the judge prohibited by our statute. *S. v. Beal*, 764.

CREDITS. See Clerks of Court, 2.

CRIMINAL LAW. See False Imprisonment, 1, 2; Intoxicating Liquors, 1, 2, 6; Landlord and Tenant, 1; Malicious Prosecution, 1; Statutes, 5, 6, 9; Appeal and Error, 2; Arrest, 2; Constitutional Law, 2, 4; Indictment, 3, Instructions, 7; Jury, 1.

1. *Criminal Law—Pleas—Former Jeopardy.*—Upon plea of former jeopardy in a criminal action, the question presented by such plea must ordinarily be determined by the evidence. *S. v. Gibson*, 697.

2. *Same—Same or Separate Offenses.*—Upon such a plea it is not sufficient that the two prosecutions should have grown out of the same transaction, for the plea will not be sustained unless there is an exact and complete identity in the two offenses charged in the bills, as they must be for the same crime, both in law and in fact. *Ibid.*

3. *Same—False Pretense.*—Where a bill of indictment charges that the defendant obtained money by a false pretense from a certain person therein named, and the proof was that he had not received any money from him, but had obtained his signature on a note by false pretense, upon which he had obtained money from another, and the action is dismissed for variance between the charge and the proof, the defendant may not successfully plead former jeopardy upon trial under another and separate indictment charging the false pretense in the procurement of the note from another person. *Ibid.*

4. *Same—Indictment.*—An indictment for a criminal offense should state the offense charged with reasonable certainty, or set forth the special manner of the whole fact so that it can be clearly seen what particular crime is intended to be alleged; and while in this indictment for obtaining a note by false pretense the bill should have charged expressly and directly that the defendant obtained the note by reason of the false pretense, it sufficiently informed the defendant of the particular charge against him, and is held not to be fatally defective. *Ibid.*

5. *Criminal Law — Pleas — Former Jeopardy — Issues of Fact — Trials—Questions for Jury.*—It is unnecessary for the trial judge, upon defendant's plea of former jeopardy in a criminal action, to submit to the jury an issue as to the identity of the evidence in the two actions, it appearing that the offenses charged were not the same either in fact or law. *Ibid.*

CRIMINAL LAW—*Continued.*

6. *Criminal Law—Municipal Courts—Chief of Police—Process.*—Where the statute provides that process of a municipal court "shall be issued by either the judge of said court or by the chief of police, the same to be issued on affidavit and returned forthwith to the court," the authority given the chief of police to issue process inferentially confers on him the power to pass upon the sufficiency of the complaint as basis for a warrant and to administer the oath before issuing the process. *S. v. Turner*, 701.

7. *Criminal Law — Quashing Indictments — Process—Amendments—New Bill—Courts.*—A defective process may be amended by the court having charge of the criminal case wherein an arrest has been made; and when the indictment has been quashed, the defendant is not necessarily discharged, for the court, in its discretion, may hold him until a new warrant is served or a new bill is found. *Ibid.*

8. *Criminal Law—Motions to Quash—Defects in Warrants—New Process —Courts.*—A motion to quash in arrest of judgment lies only for a defect on the face of the warrant or indictment, and upon objection to defective process or improper service the remedy is by abatement or motion to dismiss, and when allowed, the court will usually issue a correct warrant or have it legally served at once. *Ibid.*

9. *Criminal Law—Appearance—Defective Process—Waiver.*—Irregularity of process in a criminal case is waived by the defendant appearing generally in an inferior court, and the objection cannot be taken after verdict and in the Supreme Court on appeal. *Ibid.*

10. *Criminal Law—Appearance—Motions to Quash—Arrest of Judgment—No Offense Charged—Jurisdiction—Appeal and Error.*—Motions to quash and in arrest of judgment can only be entertained in the trial court after a general appearance of the defendant or the plea of not guilty, upon the ground that the matter charged does not constitute a criminal offense or to the court's jurisdiction; and this rule applies in appellate courts. *Ibid.*

11. *Criminal Law—"Boarding-houses"—Proprietor or Manager—Interpretation of Statutes.*—One who has not been licensed to keep a boarding-house, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boarding-house; and this case does not fall within the intent and meaning of the Revisal, sec. 3434a, making it an offense for one to obtain any "lodging, food, or accommodation at an inn, boarding-house, or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof," the word boarding-house, placed with inns, etc., indicating that its use as such must be of a more general character, and the words "proprietor or manager" are not descriptive of the owner of a private dwelling. *S. v. McRae*, 712.

12. *Criminal Law—Evidence—Statements of Prisoner.*—Voluntary statements, made by one accused of murder, to the officer arresting him for the crime are not incompetent simply because the accused was at the time in custody or in jail. *S. v. Cooper*, 719.

13. *Same—Homicide—Declarations—Subsequent Statements.*—Where the defense of insanity is relied upon on the trial by the prisoner accused of murder, testimony of the officers of what the prisoner said as to how the homicide was committed, and soon after the arrest, are competent upon the question of the mental condition of the prisoner at

CRIMINAL LAW—*Continued.*

the time of the homicide, and such declarations are not confined to the exact time of the killing, or objectionable as hearsay evidence; but they must have been made by the prisoner at a time sufficiently close to the act to have some probative force in regard to his mental condition at the time. *Ibid.*

14. *Criminal Law—Health—Nuisance—Interpretation of Statutes.*—Evidence that defendant's stable, located within 4 feet of a family dwelling-house, was in so foul and filthy condition as to prevent, at times, a member of the family from eating his meals, and that the owner of the stable had been notified by the health officer and failed to abate the nuisance, is sufficient for conviction under the provisions of section 12, chapter 62, Public Laws 1911, and for the imposition of the fine prescribed by section 13 thereof. *S. v. Wilkes*, 735.

15. *Criminal Law—Health—Stables—Nuisance—Evidence—Other Stables.* Where the owner of a stable has been indicted for maintaining a nuisance dangerous to health in the opinion of the county superintendent, chapter 62, Public Laws 1911, testimony as to the condition of other stables in the same locality is irrelevant and properly excluded upon the trial. *Ibid.*

16. *Criminal Law—Landlord and Tenant—Trespasser—Claim of Right—Reasonable Belief—Trials—Questions for Jury—Interpretation of Statutes.*—For a conviction under the provisions of Revisal, sec. 3688, for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser entered under a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence in this case is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had peaceably entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. *S. v. Faggart*, 737.

17. *Criminal Law—Pleas—Former Jeopardy—Not Guilty.*—The plea of not guilty of the criminal offense charged and of former jeopardy may be relied on as a defense in the same action. *S. v. Smith*, 742.

18. *Criminal Law—Accessory—Principal Not Tried.*—An accessory before the fact may be put on trial irrespective of whether the principal shall have been put on trial or not. *S. v. Stephens*, 745.

19. *Criminal Law—Attempt to Commit Arson—Felony—Statutes.*—Revisal, sec. 3338, changes the common-law offense of an attempt to commit arson from a misdemeanor into a felony. *Ibid.*

20. *Criminal Law—Seduction—Breach of Promise—Requisites.*—For conviction for seduction under promise of marriage it is necessary to show the criminal act, submission thereto by the prosecutrix under the promise, and that she was innocent and virtuous. *S. v. Cline*, 751.

21. *Criminal Law—Seduction—Prosecutrix's Evidence — Corroboration.*—Upon trial for seduction under promise of marriage, evidence tending to show that the defendant told the witness that he was in trouble with regard to the prosecutrix, and asked his advice, and upon being

CRIMINAL LAW—*Continued.*

asked if he had promised the prosecutrix to marry her, replied "that they had talked together of getting married," is sufficiently corroborative of the direct testimony of the prosecutrix in that respect to make her evidence competent. *Ibid.*

22. *Criminal Law—Seduction—Virtuous Woman—Evidence.*—To convict of the offense of seduction under breach of promise of marriage, it is required that the innocence or virtue of the woman must be shown, or that she had not theretofore had sexual relation with another; and though the general character of the prosecutrix for virtue is highly corroborative, she alone is capable of giving direct evidence on the subject. *Ibid.*

23. *Criminal Law—Homicide—Trials—Mistrials—Orders of Court—Appeal and Error.*—The Action of the trial judge, on a trial for homicide, in withdrawing a juror, discharging the other jurors, and again beginning the trial, is in effect an order for a mistrial, whether these words were used by the court or not. *S. v. Upton*, 769.

24. *Criminal Law—Evidence—General Reputation—Intoxicating Liquors—Search and Seizure.*—On cross-examination a character witness may be asked the general reputation of a party to the action as to particular matters, and as to a particular trait, but not of particular acts; and where the defendant is being tried for the violation of our prohibition law, under the Search and Seizure Act, it is competent, on cross-examination, for the solicitor to ask the witness as to defendant's reputation for dealing in liquor. *S. v. Cathey*, 794.

25. *Criminal Law—Intoxicating Liquors—Sentences—Alternative Judgment.*—Where one has been previously convicted of violating our prohibition law, and the case is on appeal to the Supreme Court, and upon a second conviction the court sentences him so as not to take effect concurrently with the sentence pronounced and appealed from, but, should the former sentence be set aside, the present sentence to take effect immediately: *Held*, the sentence imposed was not objectionable as being alternate or conditional, and its terms are such as the law would otherwise have written into it. *Ibid.*

CROSSINGS. See Negligence, 10; Railroads, 7.

DAMAGES. See Municipal Corporations, 9, 11, 15; Nuisance, 1, 2; Roads and Highways, 1; Telegraphs, 3; Carriers of Goods, 1, 5, 6; Commerce, 1, 3; Condemnation, 1; Contracts, 5, 7; Conversion, 1; Deeds and Conveyances, 11; Easements, 6; Evidence, 18; Instructions, 4; Limitation of Actions, 6; Married Women, 2, 4; Municipal Corporations, 5, 8, 9, 11, 14, 15.

DANGEROUS INSTRUMENTALITIES. See Electricity.

DEADLY WEAPON. See Homicide, 3; Appeal and Error, 32.

DEATH, WRONGFUL. See Statutes, 1, 2.

DECEASED PERSONS. See Evidence, 1, 10, 21, 23; Homicide, 5.

DECLARATIONS. See Deeds and Conveyances, 26; Evidence, 2, 19, 21, 23, 25; False Imprisonment, 3; Principal and Agent, 3; Criminal Law, 13; Homicide, 11, 21.

DEDICATION. See Deeds and Conveyances, 22, 23.

DEEDS AND CONVEYANCES. See Easements, 3, 4, 5; Equity, 1, 2, 6; Escheat, 1, 2; Estates, 1; Married Women, 1, 2, 3, 4, 5; Mortgages, 1, 2; Reformation, 1; Registration, 1; Trusts, 1; Wills, 2, 3.

1. *Deeds and Conveyances—Registration—Judgments—Liens—Interpretation of Statutes.*—Where a judgment is obtained against a grantor of lands subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. Revisal, sec. 980. *Realty Co. v. Carter*, 5.

2. *Deeds and Conveyances—Husband and Wife—Gifts—Resulting Trusts.* The law regards a purchase of lands by the husband, with his own money, and the conveyance thereof made to the wife, as a gift to the wife, and not as creating a resulting trust in his favor. *Ibid.*

3. *Same—Judgment Debtor—Estoppel.*—When the original owner of lands has sold and conveyed them to the plaintiff, and the defendant is a judgment creditor of the plaintiff's grantor, having a lien superior to the plaintiff's title, and some of these lands had been sold and conveyed by the plaintiff to the defendant's wife, but paid for by him, the fact that the defendant paid the purchase price for his wife's land creates no estoppel which would prevent his collecting his judgment out of the remaining lands owned by the plaintiff. *Ibid.*

4. *Deeds and Conveyances—Estates in Remainder—Estoppel—Rebutter.* Where the devisee of an interest in remainder in lands has conveyed such interest to the life tenant, who conveys the same to another, this interest inures to the benefit of the grantee of the life tenant and passes to him by way of estoppel or rebutter. *Cooley v. Lee*, 18.

5. *Deeds and Conveyances — Husband's Deed — Homestead — Dower — Joinder of Wife.*—Where a husband conveys his land without having his wife join in the deed, the grantee acquires the land free from the right of the wife to a homestead, unless the same has been laid off therein to the husband (Const., Art. X, sec. 8; Revisal, sec. 686), but subject to the wife's right of dower, should she survive him. *Dalrymple v. Cole*, 102.

6. *Same—Contracts—Value of Dower—Trials—Questions for Jury—Judgments.*—Where a husband has contracted to convey his lands for a certain consideration, and he has failed of performance thereof by reason of the refusal of his wife to execute the deed with him, and the purchaser seeks in his action to enforce the performance of the contract, diminished by the wife's interest in the lands, it is proper that the question of the value of this interest be left to the jury and the purchase price accordingly diminished; and as this interest is only the value of her inchoate right of dower, it is reversible error for the trial judge to exclude from the consideration of the jury the value of this inchoate right and substitute the value of the homestead right, when the homestead has not been laid off to the husband, and there is no lien by judgment on the lands. *Ibid.*

7. *Same—Mortgages.*—Where there is a mortgage on the lands of the husband executed properly by both husband and wife, and there is also a lien by judgment thereon, and the husband has contracted to sell these lands free from encumbrances and pay off the judgment out of the purchase money: *Held*, the execution of the mortgage by the wife releases both her homestead and right of dower to the mortgagee, and as the lien of the judgment has been agreed to be paid out of the pur-

DEEDS AND CONVEYANCES—*Continued.*

chase money, the purchaser is entitled to judgment that these liens be paid out of the purchase price and the lands be conveyed subject to the wife's inchoate right of dower, the value of which to be ascertained by a jury and deducted from the purchase price. *Ibid.*

8. *Deeds and Conveyances — Husband's Deed — Mortgagee—Contracts—Dower—Tender—Payment into Court—Judgments.*—Where the husband has agreed to convey his lands free from encumbrances for a certain price, and there are liens by mortgage thereon, and his wife has refused to join in the conveyance, it is not required that the purchaser, in his action for specific performance, pay the sum agreed upon into court; for it is a sufficient tender when he alleges in his complaint that he was ready, willing and able to do so upon his betting the title for which he had contracted. *Ibid.*

9. *Limitation of Actions—Deeds and Conveyances—"Color"—Registration—Possession—Ouster—Notice.*—Where the deceased owner of lands leaves a widow, who, without allotment of dower, remains on the land until her marriage, and then conveys them, with her husband, in fee, for a valuable consideration, and the grantee has his deed recorded and enters into possession and builds upon and exclusively uses the lands, the registration of the deed and the occupancy of the lands put the heir at law of the original owner upon notice of the act of ouster and hostile possession, and the continuous possession by the grantee, or those claiming under him, for seven years, under the deed as color, will ripen the title. *Graves v. Causey*, 175.

10. *Same—Widow—Heirs at Law.*—The possession of the widow of the deceased owner of lands is not hostile to his heirs, but subservient to their title, and those claiming under the widow generally stand in no better position unless there has been some open, unequivocal act on their part indicating that their possession is adverse. *Ibid.*

11. *Deeds and Conveyances — Warranty — Breach of Part — Measure of Damages.*—Where land is sold and conveyed and the title to a part thereof fails, in an action for breach of warranty and seizing the damages recoverable is the value of the proportionate part of the lot to which the title failed, based upon the consideration paid for the whole thereof; and the fact that the land was worth greatly in excess of the purchase price can have no bearing on this issue. *Campbell v. Shaw*, 186.

12. *Fraud—Deeds and Conveyances—Railroads—Right of Way—Trials—Evidence—Questions for Jury.*—A false affirmation made by a person to defraud another, whereby that other person receives damages, is the ground of an action in the nature of deceit; and where there is evidence that a railroad company has procured a right of way from the owner of the land, an ignorant and illiterate person, through the statement of its agent, a neighbor of the owner, that the railroad could take his land for the purpose and forbid his crossing from one part of his farm to the other, and it was then agreed that the company would locate the right of way over a certain place, which it did not do, but did so over a richer and cultivated portion, under an agreement in the writing giving the company full choice of location; and further evidence that these representations were knowingly false to the agent: *Held*, sufficient for the determination of the jury upon the question of fraud in the procurement of the deed, and to set the deed aside on that ground. *Starnes v. R. R.*, 222.

DEEDS AND CONVEYANCES—*Continued.*

13. *Railroads—Deeds and Conveyances — Rights of Way — Fraud — Damages.*—Where the owner of land brings suit against a railroad company to set aside a deed to a right of way for fraud, and the right of way has been located at a different place from the one contemplated, for which no compensation was to have been made, it is incompetent to show, upon the issue of damages, that the lands taken were not worth more than those contemplated; for the fraud, when sufficient and established, sets aside the conveyance in its entirety, and permits the owner to be compensated for the right of way actually taken by the defendant. *Ibid.*

14. *Equity—Deeds and Conveyances—Correction—Mortgages—Quantum of Proof—Evidence.*—A suit to declare that the title conveyed by deed to the defendant was under an agreement that he should hold the legal title until the plaintiff should pay off certain mortgages and then a conveyance of the land be made by the defendant to the plaintiff, is, in effect, one to correct the defendant's deed and convert it into a mortgage, placing the burden upon the plaintiff to establish his allegations by strong, clear and convincing proof; and an instruction by the court that he is required to do so by the preponderance of the evidence is reversible error to the defendant's prejudice. *Ray v. Patterson*, 226.

15. *Equity—Deeds and Conveyances—Correction—Mortgages—Agreements —Right of Redemption.*—Where a conveyance of land is corrected so as to make the transaction, in effect, a mortgage, no agreement therein can deprive the mortgagor of his right to redeem, for equity will regard the substance and not the form. *Ibid.*

16. *Equity—Deeds and Conveyances — Correction — Verdict — Judgment.*—This suit was to declare that the defendant's deed to lands was acquired under an agreement with the plaintiff that the former should convey the lands to the latter upon his paying off certain outstanding mortgages. Upon this issue the trial judge incorrectly charged as to the quantum of proof required, and the plaintiff moved for judgment upon the verdict on other issues, finding that the defendant was the owner of the notes and mortgages at the time of the execution of his deed, and that the value of the land was $3 per acre, and upon the ground that they established the relationship of mortgagor and mortgagee, and inadequacy of the price: *Held*, these matters were but evidentiary under the circumstances of this case, upon the question of whether the transaction concerning the defendant's deed was as the plaintiff claimed, and were not sufficient upon which to base a judgment either in plaintiff's or defendant's favor. *Ibid.*

17. *Deeds and Conveyances—Interpretation—Trusts and Trustees.*—A deed will be construed as a whole so as to give a meaning to every part thereof, when permissible, without special regard for its formal arrangement, so as to effectuate the intent thereof; and a deed to E. and certain others, trustees of the T., etc., corporations, with habendum, "to have and to hold the above described tracts of land to them, the above mentioned trustees, their heirs and assigns forever," is held to convey the lands to the parties designated as trustees for the corporations named. *Gold Mining Co. v. Lumber Co.*, 273.

DEEDS AND CONVEYANCES—*Continued.*

18. *Deeds and Conveyances — Trusts and Trustees — Beneficiaries — Misnomer—Parol Evidence.*—The identity of a person named as a beneficiary of a trust created by deed may be shown by parol evidence, where it is at most a misnomer or latent ambiguity, and it is apparent that the claimant was the person intended. *Ibid.*

19. *Deeds and Conveyances—Grantor in Possession — Evidence — Permissive User.*—Where a grantor of lands remains in possession after executing the deed, paying taxes thereon and listing the lands in his own name, and paying no rent, it is *held* that, in the absence of evidence of a parol trust, or of fraud or undue influence, such possession was not inconsistent with a permissive occupancy of the property by the grantee, and, under the circumstances of this case, it afforded no evidence that the deed was invalid. *Campbell v. Sigmon*, 348.

20. *Evidence—Deeds and Conveyances—Consideration—Parol Evidence.*—The recited consideration and its receipt in a deed to lands is not regarded as a part of the conveyance, and may be contradicted by parol evidence. *Ibid.*

21. *Deeds and Conveyances—Husband and Wife—Conveyance to Husband —Certificate—Statutes.*—It is necessary to the validity of a deed to lands, made by the wife to her husband, that the justice of the peace find and certify in his certificate of probate that, at the time of her privy examination, the contract or deed was not unreasonable or injurious to her; and, where the deed is void for noncompliance with the statute, her covenant of warranty materially affecting her estate is also ineffectual and cannot operate to estop her or those claiming under her. *Wallin v. Rice*, 417.

22. *Deeds and Conveyances — Maps — Streets — Dedication — Municipal Acceptance.*—Where a tract of land contiguous to a city is purchased and laid off into lots, streets, etc., for residential purposes, and a map thereof made and deeds made to the purchaser of these lots with reference to the lot numbers or streets platted, and the map is kept in the office of the promoters, the platting of the land and conveying the lots as stated is a dedication of the streets to the public in general and to the purchasers of the lots in particular, the intention to dedicate being manifested by the maps and deeds; and it is immaterial whether the streets were actually open at the time the lots were conveyed or whether they have been accepted by the municipality. *Wheeler v. Construction Co.*, 427.

23. *Deeds and Conveyances — Maps — Streets—Dedication—Obstruction—Nuisance—Injunction—Equity.*—Where the owner of land has platted it into lots for residential purposes and dedicated the streets, neither he nor the purchasers of the lots from him may thereafter close the streets or use them for their private purposes against the interest of the other purchasers of the lots; and the remedy is by injunction or other proper remedy to have the nuisance abated. *Ibid.*

24. *Deeds and Conveyances—Course—Natural Boundaries.*—Where there is a call in the description to a given boundary in a conveyance of land, which is at variance with the course specified therein, the natural object will control the course, it being the evident intent of the parties that the line should be thus established, and not that a mere word, in which a mistake is more likely to occur, should control. *Byrd v. Spruce Co.*, 429.

DEEDS AND CONVEYANCES—*Continued.*

25. *Same—Evidence.*—Where the controversy involving title to lands is over the description of a boundary given in a deed, to wit: "Southwesterly course (along the top of a ridge) along the various windings so as to include all of the headwaters of B. Creek to his own line at Grassy Knob at the right-hand fork of B. Creek," and it is shown that the line existing between former owners had been recognized as following the "top of the ridge," and called for to Celo Mountain, thence to Grassy Knob, the southwesterly course, which would be in a straight line to "Grassy Knob," would not control, but would give way to the defined line following the various courses of the ridge, first to Celo and then to Grassy Knob. *Ibid.*

26. *Deeds and Conveyances — Evidence — Boundaries—Declarations.*—Evidence of declarations of former owners as to the boundary line in dispute, being a marked and defined course between natural objects on the top of a ridge, when made forty years ago and before the controversy over the line arose, is sufficient under our authorities, and, where the evidence is sufficiently remote, declarations of shorter duration may be admitted in corroboration. *Sullivan v. Blount*, 165 N. C., 11, cited and applied. *Ibid.*

27. *Deeds and Conveyances—Defective Probate—Evidence—Identification of Lands.*—Where a deed in the chain of title of a party in an action to recover lands refers to another deed, the latter deed may be offered in evidence to identify the lands, or in aid of the description in the former deed, though having a defective probate; and where such deed has afterwards been registered upon a proper probate, the objection becomes immaterial. *Smathers v. Jennings*, 601.

28. *Deeds and Conveyances—Actions Commenced—Registration.*—A party to an action involving title to lands may cause a proper registration to be made after the commencement of the action, and use it upon the trial. *Herbert v. Development Co.*, 622.

29. *Deeds and Conveyances—Boundaries—Trials—Matters of Law—Questions for Jury.*—What are the termini or boundaries of a tract of land given in a grant or deed is matter of law for the court, and the location thereof is a matter of fact for the jury. *Power Co. v. Savage*, 625.

30. *Deeds and Conveyances — Calls — Natural Boundaries — Ascertained Lines.*—A call in a grant or deed for a natural object which is unique and has properties peculiar to itself will control when the course and distance given are at variance with it; but where the call is along an ascertained line or natural boundary to a known or established terminus or corner, and said line or boundary will not reach the designated point, the usual rule is to run the line to the point nearest to the corner called for, and then in a direct line to such corner. *Ibid.*

31. *Same—Rivers — Conflicting Calls — Interpretation — Straight Lines.*—Where the location of the true divisional line in dispute between two adjoining owners is made to depend upon calls for an unsurveyed line from one established corner to another, as follows: "thence S. 83 W. 206 poles down the river to a spruce pine on the cliff," and it appears that the river takes a winding course in the general direction indicated, but the pine is 100 yards from the near side of its bank, the court will give effect to both descriptions, as nearly as possible, by establishing the line down the various windings of the river to a

DEEDS AND CONVEYANCES—*Continued.*

point opposite the established corner, the spruce pine, and thence thereto in a direct line. *Ibid.*

DEMURRER. See Conversion, 1; Parties, 1; Pleadings, 10, 11, 12, 13, 14.

DEPOSITIONS. See Evidence, 3, 7.

DESCENT. See Deeds and Conveyances, 10; Limitation of Actions, 2; Wills, 12, 25.

DISBURSEMENTS. See Clerks of Courts, 2; Contracts, 3.

DISCRIMINATION. See Carriers of Goods, 2; Commerce, 4; Municipal Corporations, 20.

DISHONOR. See Bills and Notes, 4.

DIVERSITY OF CITIZENSHIP. See Removal of Causes, 7.

DIVORCE.

Divorce a Mensa—Pendente Lite—Alimony—Attorney's Fees—Allegation —Proof.—In order to entitle the wife to alimony and counsel fees *pendente lite* in her action for divorce, she must allege the statutory grounds for a divorce of this character (Revisal, sec. 1562), and show one of them with her evidence; and that she is entitled to a divorce on the ground of indignities to her person or conduct rendering her life intolerable. This is not sufficiently shown when it appears that no physical violence has been offered her, but that each had used violent language to the other, without it appearing whether she had offered him sufficient provocation therefor. In this case the question whether the plaintiff was justifiable in voluntarily leaving home was a question for the jury, and it is held that the order of the judge allowing her alimony and attorney's fees was improvidently entered. *Garsed v. Garsed*, 672.

DOWER. See Deeds and Conveyances, 5, 6, 8, Limitation of Actions, 12.

DRAINAGE DISTRICTS. See Evidence, 15, 16; Reference, 2.

1. *Drainage Districts — Mortgages — Assessments—Injunction—Parties — Interpretation of Statutes.*—Proceedings to form drainage districts under the statutes, chapter 442, Laws of 1909, amended by chapter 47, Laws 1911, are regarded as proceedings *in rem*, and bring benefit to the land, increasing its value and inuring to the benefit of the mortgagees and lienors thereon; and the act does not require that mortgagees or other lien-holders shall be made parties. Hence, a mortgagee may not restrain the collection of assessments made on the landowners of a drainage district under proceedings had in accordance with the provisions of the statute. It is otherwise when the property is condemned under sec. 7, ch. 442, Laws 1909. *Banks v. Lane*, 14.

2. *Drainage Districts — Mortgages — Notice — Intervenors — Judgment — Estoppel.*—Notice by publication is given in proceedings to form a drainage district under laws 1909, secs. 5 and 15, ch. 442, as amended by the Laws of 1911, sec. 1, of the filing of the report in the office of the clerk of the Superior Court, which is open to inspection to the landowner or other person interested, and a mortgagee of lands who

DRAINAGE DISTRICTS—*Continued.*

does not intervene and assert his rights to oppose the proceedings is bound by the final judgment. *Ibid.*

3. *Same—Title.*—The mortgagee of lands within a drainage district laid off in conformity with the statutes is in no better condition in relation to assessments made on the land than the mortgagor in possession under apparent legal title, and can assert no superior rights in that respect. *Ibid.*

4. *Drainage Districts—Procedure—Judgments—Assessments—Mortgages—Collateral Attack.*—The drainage acts are constitutional and the validity of a district laid off accordingly cannot be collaterally attacked; and a mortgagee of lands situate therein, being bound by the final decree, may not, in an independent action, restrain the collection of assessments made on the lands to pay bonds issued for their improvement. *Ibid.*

5. *Drainage Districts—Judgments—Benefits.*—A final decree in proceedings to lay off a statutory drainage district is an adjudication that the benefits derived to the land within the district are more than the burdens assessed against it for such purpose. *Ibid.*

6. *Drainage Districts—Mortgages—Insolvent Owner—Benefits—Additional Security.*—The insolvency of a mortgagor of land within a drainage district regularly established under the statutes gives the mortgagee no added right to enjoin the assessments on the land for the improvements made, for such improvements inure to the security of the mortgage debt. *Ibid.*

7. *Drainage Districts—Mortgages—Purchase Price—Parties—Ownership of Lands.*—The principle that a conveyance of land executed simultaneously with a mortgage thereon for the purchase money does not pass the title does not apply to lands situate in a drainage district laid off under the statutes, so as to constitute the mortgagee the owner of the lands for the purposes of the proceedings, nor require that he should be made a party thereto. *Ibid.*

8. *Drainage Districts—Reports—Exceptions—Appeal—Bond Issues—Statutes.*—Under the Drainage Act, Public Laws 1909, ch. 442, appeals are separately provided for under sec. 8, when the drainage district has been laid off, and under sec. 17, when the final act is passed upon; and where the complaining owner of land in the district has not entered an exception under either of these two sections, as the statute provides, and bonds have been duly issued on the lands of the district for drainage purposes, and thereafter application has been made by the commissioners for the issuance of additional bonds, in the further proceedings he may not be permitted to go back and change the formation of the district and the classification and assessments already made, by attacking the reports of the engineers and viewers, and withdraw a large part of his lands from the district theretofore formed. *Drainage District v. Parks*, 435.

9. *Same—Purchasers with Notice.*—Where the owner of land in a drainage district has duly excepted under sec. 8, ch. 442, Public Laws 1909, and again under sec. 17 of said chapter, and appealed, the purchaser of bonds issued by the district takes with notice of the rights of the complaining party so excepting, and acquires the bonds subject thereto. *Ibid.*

DRAINAGE DISTRICTS—*Continued.*

10. *Same—Reference—Notice—Invalid—Reports.*—Where the complaining party has duly excepted and appealed from the manner of forming a drainage district under ch. 442, Public Laws 1909, and from the assessments made thereunder, and, with the consent of the parties, the court has referred the controverted matter to three referees, one each to be selected by the parties, and the other by the referees selected, a report made by two of them without notifying the other, and in his absence, is not valid, though the reference provides that the report of any two of them should be so, the intent of such provision being that the third be notified, and should he fail or refuse to attend, the others may not be prohibited from making it. *Ibid.*

11. *Drainage District — Reports — Exceptions—Appealable Matters—Statutes.*—Sec. 17, ch. 442, Public Laws 1909, providing for an appeal upon exception to the final report by an owner of lands in a drainage district laid off under the provisions of the statute necessarily refers to the formation of the district and the assessments of the lands embraced in it. *Ibid.*

DRUG STORES. See Municipal Corporations, 21, 22.

DUE COURSE. See Bills and Notes, 5, 6.

EASEMENTS. See Contracts, 7; Deeds and Conveyances, 12, 13.

1. *Easements—Way of Necessity—Rights of Way.*—Where one conveys a part of his estate he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which were reasonably necessary for the use of that part. *Carmon v. Dick*, 305.

2. *Same—Character of Use.*—To create an easement or way of necessity over a part of the estate conveyed, formerly used by the owner before the severance of the estate for the benefit of the whole, it is required that there must be a separation of the title; that the former use of the way which gives rise to the easement shall have continued so long and so obviously, or manifestly, that it was meant to be permanent, and that it was necessary to the beneficial enjoyment of the land granted. *Ibid.*

3. *Easements—County—Deeds and Conveyances — Reservations — Reconveyance—Release.*—A deed by a county to lands adjoining its courthouse square upon agreement that the land at a certain location shall forever be kept open as vacant and unoccupied ground, except such obstruction as may be made by shade trees planted thereon, extends the benefit of the reservation of its use only to the property conveyed, and not to other property differently situated and not adjoining, owned by the grantee; and where the property thus conveyed has since been acquired by the county, the reconveyance in fee simple releases the easement created under the conveyance made by the county. *Guilford County v. Porter*, 310.

4. *Easements—Deeds and Conveyances—Reservations—Public Squares—Courthouse Squares—Counties.*—A conveyance to a county of a lot adjoining its courthouse square, reserving an easement therein that the "lot herein conveyed" shall be used by the county "as a public square," and if any building inconsistent therewith shall be erected "thereon" the grantor, his heirs and assigns, "may enter upon the

EASEMENTS—*Continued.*

lands herein conveyed" and remove any building thereon inconsistent with its use as a public square: *Held*, no restriction is therein imposed upon the county in the use of the adjoining square, whether existing at the time or thereafter acquired by it, and the easement is preserved intact so long as the land conveyed is used as a "public square," not necessarily a part of the courthouse square. *Ibid.*

5. *Easements—Counties—Statutes—Contracts—Deeds and Conveyances—Reservations.*—The Legislature authorized Guilford County to purchase additional adjoining lands to the courthouse square, reciting that it was for the purpose "to lessen the danger from fire": *Held*, no easement arises except from the contract of the parties, and in this case none could be imported into the conveyance of land to the county in favor of the grantor merely by virtue of the recital of the act, for an easement is never inferred in favor of a grantor, but must be expressly reserved in the conveyance. *Ibid.*

6. *Easements — Remedies of Owner — Measure of Damages—Railroads—Right of Condemnation.*—Where a railroad company enters upon lands by virtue of its franchise and constructs and operates its railroad thereon, the remedies for compensation available to the owner are either to petition before the clerk under the statutes governing such proceedings or to sue in the Superior Court for permanent damages, the measure thereof being the market value of the lands actually covered by the right of way, and such damages thereby caused to the remainder of the tract, deducting from the estimate the pecuniary benefits or advantages special and peculiar to the land in question; and, when such are paid, an easement will pass as in case of condemnation. *McMahan v. R. R.*, 456.

ELECTIONS. See Executors and Administrators, 1; School Districts, 2; Indictment, 6.

1. *Elections — Municipal Corporations — Bond Issues—Registration—Statutes.*—Where the charter of a city or town provides that for the issuance of bonds an election shall be held "under the rules and regulations presented by law for regular elections," it refers to Revisal, sec. 4323, requiring that the books of registration shall be kept open for twenty days; anl construing this section in connection with section 2949, it is *Held*, that the former is for the purpose of a new and original registration, and the latter, in providing for only seven days, is for the purpose of revising the registration books so that electors may be registered whose names are not on the former books, *Hardee v. Henderson*, 572.

2. *Same—Appeal and Error—Records—Supreme Court—Findings of Fact.* Where it is required for an election for the purpose of issuing municipal bonds that the books of registration shall be kept open for twenty days (Revisal, sec. 4323), but they had been kept open for only seven days (Revisal, sec. 2952); and it appears to the Supreme Court from the record on appeal, though the trial judge has not found the facts, that no elector had lost his vote, but all were registered who desired and deserved to be; that the election was fairly held, the registration was well advertised, and the time for each was appointed by law and the order of the commissioners was well known, and the right to register was available to all; that the failure of any to register was

ELECTIONS—*Continued.*

not due to the shortness of the time the books were kept open; and that the proposed issuance of bonds was generally acquiesced in by the people without organized opposition, it is *Held*, that this Court will so find the facts to be, and uphold the validity of the bonds. *Ibid.*

ELECTRICITY.

Electricity—Dangerous Instrumentalities — Inspection of Wires — Negligence—Evidence—Questions for Jury.—A corporation using electricity for lighting and power purposes, with its wires running along or above the streets of a town, are held to a high degree of care in the supervision and maintenance of its wires for the protection of the public from the danger of its use; and where, in an action to recover damages against such corporation, the evidence tends to show that a chain hanging down along a post, used in manipulating its arc street lamps, came within reach of children twelve years of age, and at the time in question had become so charged with electricity as to shock and seriously injure a boy fourteen years of age who caught hold of a ring at the lower end thereof; that this chain was not insulated or provided with the usual block arranged to intercept the current: *Held*, sufficient upon the question of the defendant's actionable negligence in permitting the conditions to exist. *Parker v. Electric Co.*, 169 N. C., 68 cited and distinguished. *Ragan v. Traction Co.*, 92.

EMPLOYER AND EMPLOYEE. See Master and Servant.

ENTIRETIES. See Husband and Wife, 2; Mechanics' Liens, 2.

EQUITY. See Conversion, 1; Costs, 1; Courts, 1, 4; Escheat, 1; Levy, 1; Mortgages, 2; Pleadings, 7; Reformation, 1; Deeds and Conveyances, 16, 23; Escheat, 1; Judgments, 7; Levy, 1, 2; Married Women, 3, 6; Mortgages, 3, 5; Pleadings, 6; Public Roads, 3; Reformation, 1; Usury, 2; Wills, 2.

1. *Equity — Reformation — Deeds and Conveyances.*—Equity will not relieve against a deed for mistake of one of the parties unless it is shown that it was brought about by the fraud of the other; but it will reform a deed, in the absence of such a fraud, where the mistake of the parties is mutual, or is that of the draftsman entrusted to prepare the instrument. *Shook v. Love*, 99.

2. *Same—Timber Deeds—Registration—Evidence.*—Where the grantor in a deed to lands has theretofore conveyed the timber thereon, with the usual provisions as to the time for cutting and removing it, but the deed to the timber is registered after that conveying the lands, evidence that the grantor informed the grantee in the deed to the lands, at the time of the conveyance, that there was an outstanding deed for the timber thereon expiring at a certain future time, is not alone sufficient upon which a court of equity will reform the deed to the lands, upon allegation that by mutual mistake of the parties the timber was embraced in it, and thus avoid the title to the timber under the prior registered deed to the lands. *Ibid.*

3. *Equity—Injunction—Cloud on Title—Judgment Liens—Fraud.*—A devise of lands for life, authorizing the life tenant to sell a portion

EQUITY—*Continued.*

thereof to pay debts due by the estate, and at the termination of the life estate the lands to be sold and the proceeds divided between W., the husband of the life tenant, and certain others specified, in certain proportions. There were affidavits tending to show that to pay debts against the estate it was necessary to sell the whole of the lands, which were purchased at the sale by the life tenant at an adequate price, the executor, W., and the heirs at law joining in the conveyance. A judgment creditor of W. issued execution and levied upon the lands, and was proceeding to sell the interest of W. when he and others interested instituted their action to have the sale under the levy restrained and the lien of the judgment removed as a cloud on the title; and the defendant sets up in his action that the transaction was a device to hinder, delay or defraud him in his rights: *Held*, equity will take jurisdiction in such instances of removing the cloud upon the title to lands, and the main relief sought being by injunction, and a material question being raised making for plaintiff's right and tending to establish it, the restraining order will be continued to the final hearing. *Little v. Efird*, 187.

4. *Equity — Lands — Conflicting Liens — Clouds on Title — Fair Sale.*— Where the sale of lands is sought in a suit, equity will remove clouds upon the title thereof, so that the lands may bring a fair price at the sale; and where conflicting liens between senior and junior judgment creditors and the rights of the purchasers subject thereto are involved, the rights of the parties in the distribution of the proceeds of the sale will be adjudicated. *Brown v. Harding*, 253.

5. *Equity — Liens Assigned — Subrogation.*—Where a senior judgment creditor has a lien under his judgment on the entire lands of his judgment creditor, and a part thereof only is subject to the lien of a junior judgment, the junior judgment creditor may pay off the prior lienor and have the judgment assigned to him, and thus become subrogated to his rights; or if the lands have been sold under the prior judgment lien, by compulsion of legal process, he has right of subrogation in the proceeds, as the land occupies, in the contemplation of equity, the position of surety to the debt. *Ibid.*

6. *Equity—Judgments — Liens — Deeds and Conveyances — Purchasers— Subrogation.*—Where the owner of land subject to a lien by judgment sells and conveys a part thereof and subsequently the remaining part, it was the duty of such owner to pay off the judgment debt before making the second conveyance in exoneration of the land sold to the second purchaser, or forfeit the remaining part of the land to the extent necessary to do so; and as between the second purchaser and the judgment creditor the former has the equity to compel the latter to subject the land first conveyed to the satisfaction of his lien. ***Ibid.***

7. *Equity—Title—Parties—Trespass.*—The owners of the equitable title to lands can maintain their action for recovery thereof and for damages against the wrongdoer, without the necessity of first having new trustees appointed by the courts in the place of those who are dead or whose whereabouts are unknown. *Gold Mining Co. v. Lumber Co.*, 273.

ESCHEAT.

1. *Escheat — Judgments — Execution Sales — Deeds and Conveyances — Laches — Innocent Persons — Equity.*—Where a judgment final has

ESCHEAT—*Continued.*

been obtained by default of an answer in the course and practice of the court and regular upon its face in favor of the University of North Carolina, by escheat, against the husband of the deceased owner of the land, who had died without issue born alive, and more than seven years thereafter the husband sets up a will in his favor from his deceased wife, and claims the lands thereunder from the grantee of a purchaser at the execution sale, who, with his grantor, have been in possession for more than seven years under their deeds, the will cannot relate back to the death of the testator as against the title of the purchasers, being free from laches, for where one of two innocent persons must suffer, the one who has not been guilty of laches will be protected. *Stelges v. Simmons*, 42.

2. *Same — Default — Estoppel.*—Where a judgment by default final has been rendered, for the want of an answer, in the course and practice of the courts in proceedings regular upon their face, in an action to recover lands, the complaint alleging that the plaintiff is the owner thereof, and no motion in the cause to have it set aside for excusable neglect has been made within twelve months and no independent action has been brought to set aside the judgment for fraud, it will estop the defendant from asserting any right he may have to the land. *Ibid.*

ESTATES. See Deeds and Conveyances, 4; Husband and Wife, 2; Judgments, 10; Mechanics' Liens, 2; Wills, 1, 2.

1. *Estates — Remaindermen — Deeds and Conveyances—Tenants in Common—Limitation of Actions.*—Where a tenant for life in land, and one of several remaindermen, has conveyed the *locus in quo* to a stranger, *semble*, this grantee and the other remaindermen are tenants in common, requiring twenty years adverse, etc., possession of such grantee after death of life tenant to ripen the title in himself. *Cooley v. Lee*, 18.

2. *Estates — Remainderman in Possession — Accounting — Rents and Profits—Promise to Pay—Reference—Evidence—Conclusion of Law.* While the life tenant, in the absence of a valid conveyance of the rents and profits, is ordinarily entitled to recover them from the remainderman when both live together upon the land, this does not apply between mother and son when they are living thereon, with the latter's family, for a long term of years, the son taking full charge and management of the lands and supporting them all therefrom; and when the matter has been referred and the facts so found and approved by the trial judge, it is sufficient to sustain the conclusion of law, in the absence of a promise to pay on the part of the son, that he is not chargeable with the rents and profits. *Townsend v. Rowland*, 31.

3. *Estates—Remainderman in Possession—Rents and Profits—Burden of Proof.*—In an action to recover rents for the life estate in lands from the remainderman in possession, evidence of the value thereof for the time of such possession must be introduced by the plaintiff in order for him to recover them. *Ibid.*

4. *Estates — Wills — Devises — Bodily Heirs — Contingent Limitations—Deeds and Conveyances—Fee Simple.*—A devise of land to S. "to belong to her and her bodily heirs, and should she die and leave no

ESTATES—*Continued.*

bodily heirs, it then comes back to her brothers and sisters": *Held*, a devise of a fee-simple title to S., defeasible on her dying without bodily heirs in the sense of lineal descendants, in which event the estate would go to the brothers and sisters of S. direct from the testatrix. Hence S. cannot convey a good title to the lands so devised, there being a contingent interest outstanding in her brothers and sisters. *O'Neal v. Borders*, 483.

5. *Same—Husband and Wife—Privy Examination.*—The rule of construction applicable to wills which will prevent the first taker from making a valid conveyance in fee of lands when, under its terms, there is a contingent outstanding estate in others, applies also to deeds; and where a deed has been made by the same testatrix, before her death, upon the same limitations, without having had her privy examination taken, it is, for the want of such examination, further ineffectual. *Wallin v. Rice, ante*, 417; *Warren v. Dail, ante*, 406, cited and applied. *Ibid.*

ESTOPPEL. See Carriers of Goods, 6; Deeds and Conveyances, 3, 4; Escheat, 2; Husband and Wife, 1; Insurance, 15, 16; Judgments, 16; Municipal Corporations, 2; Principal and Agent, 5; Wills, 22.

EVIDENCE. See Equity, 2; Estates, 2; False Imprisonment, 2, 3; Grants; Homicide, 5; Instructions, 1, 6; Insurance, 2, 9; Issues, 2; Judgments, 9; Malicious Prosecution, 1, 2; Master and Servant, 1, 3, 5, 10, 12, 15, 17, 19, 20; Negligence, 1, 2, 3, 10; Principal and Agent, 1, 3; Questions for Jury, 1; Railroads, 2, 4, 10, 16, 17; Reference, 1; Slander, 1, 2, 3, 4; Telegraphs, 1, 2, 3; Wills, 5, 8, 9, 10, 11, 21; Appeal and Error, 1, 9, 19; Carriers of Goods, 3, 7; Carriers of Passengers, 1, 4; Commerce, 1; Condemnation, 1; Contracts, 1, 2, 3, 10, 12, 13; Deeds and Conveyances, 12, 19, 20, 25, 26, 27; Electricity, 1; Appeal and Error, 33; Courts, 6; Criminal Law, 12, 13, 15, 16, 17, 22, 24; Homicide, 6, 7, 8, 9, 10, 11, 12, 14, 15, 19, 20, 21, 24, 25, 26, 30; Intoxicating Liquors, 8, 9, 11; Public Lands, 3; Trials, 6.

1. *Evidence—Deceased Persons—Interpretation of Statutes—Appeal and Error.*—Objection to testimony under the provisions of Revisal, sec. 1631, as to the communications or personal transactions with a deceased person, cannot be sustained when it appears on appeal that they were not of the prohibited character, that they were in favor of the appellant, and tended to sustain his contention. *In re Mueller's Will*, 28.

2. *Evidence—Limitation of Actions — Possession — Declaration—Rule of Competency.*—Where land is sought to be held by adverse possession, in an action to recover it, it is competent to introduce in evidence declarations of one in possession which characterized or explained his possession, when such is relied upon, when they are in disparagement of his possession, or against his interests, and not merely narrative of a past occurrence; and applying this rule to the evidence in this case, the evidence is held to be incompetent. *McKimmon v. Caulk*, 54.

3. *Evidence—Depositions—Notice—Persons Named "and Others."*—Where depositions are taken upon notice to the adverse party to the proceedings that certain named persons "and others" will be examined, the testimony of other witnesses than those specified may be read upon

EVIDENCE—*Continued.*

the trial, and exception on the ground that they were not named in the notice will not be sustained. *In re Rawlings' Will*, 58.

4. *Evidence—Inference of Fact—Appeal and Error.*—In an action involving the liability of an insurance company in taking over policies of another company that had been retired from the State, it is incompetent for the Commissioner to testify as to his "understanding" of the statements made in his presence by the parties, in relation to their agreement with each other, for in this form it is objectionable as being his own inference and not what the parties said. *Morgan v. Fraternal Assn.*, 75.

5. *Same—Appeal and Error—Harmless Error.*—Objectionable testimony of a witness of his opinion of, or inference from, a fact becomes harmless when it appears that he has given this testimony substantially in an unobjectionable form. *Ibid.*

6. *Evidence—Inference of Fact—Questions and Answers—Statements of Fact.*—The answer of a witness will not be held as error for expressing his inference from a fact, when taken as a whole it permits the interpretation that it was a statement of fact relevant to the issue. *Ibid.*

7. *Evidence — Depositions — Exceptions — When Taken.*—Objection to the competency of testimony regularly taken by deposition, subject to cross-interrogatories, and opened and left on file before the trial, cannot, except by consent, be taken for the first time upon the trial while the depositions are being read. *Ibid.*

8. *Evidence — Handwriting — Comparison of Signatures—Insurance Commissioner.*—Where the Insurance Commissioner has testified that he is familiar with the signature on a letter sought to be introduced in evidence in an action against an insurance campany, from correspondence with the writer through his department relating to official matters, it is competent for him to say that the signature to the letter, from his knowledge and familiarity therewith, is genuine. *Ibid.*

9. *Evidence—Questions for Jury—Opinion of Witness.*—Where the plaintiff seeks to recover damages for the alleged negligence of the defendant railroad company in destroying his manufacturing plant by fire kindled by a spark from its passing train, and the evidence is conflicting as to whether the defendant's locomotive or the plaintiff's engine running the plant set out the fire, testimony by the plaintiff's witness that the fire could not have been caused by the plaintiff's engine is incompetent, being an expression of opinion upon a question for the jury to determine. *Kerner v. R. R.*, 94.

10. *Evidence — Transactions with Deceased — Trusts — Interpretation of Statutes.*—The plaintiff, a son and heir at law of T., brings his suit to engraft a trust upon lands upon the grounds that his father purchased the lands with his own money and instructed another of his sons, R., to pay for them, but that R. had the conveyance only of a life estate made to his father, with the remainder to himself, of which the former, an ignorant man, remained unaware: *Held*, testimony of the plaintiff, after the death of his father and brother, is incompetent as to what occurred between them in relation to the transaction alleged, as he is a person interested in the result of the action, and testimony of this character is prohibited by the statute, Revisal, sec. 1631. *Grissom v. Grissom*, 97.

EVIDENCE—*Continued.*

11. *Evidence — Negligence — Opinion — Objectionable Answers—Motions to Strike Out—Objections Stated—Appeal and Error.*—The negligence alleged in this action by an employee is that his employer, the defendant, had not provided him a safe place to work by reason of permitting ice to accumulate along a path he was required to go at night in the discharge of his duties, which the evidence tended to show was caused by the overflowing of a tank used by the defendant in the charge of another employer. The plaintiff's witness was asked, "Why was the tank running over?" to which he replied, "Because the pumper was neglecting his duty and let it continue to run after the tank was full." The admission of testimony that the pumper was neglecting his duty is disapproved as an expression of opinion, but the motion to strike out the answer being made on another untenable ground stated at the time by the appellant, will not be considered on appeal. *Renn v. R. R.*, 128.

12. *Evidence—Answers of Witness—Opinion—Statement of Fact.*—An answer to a question by a witness is not objectionable as a statement of an opinion upon the evidence, when, taking the answer as a whole and in connection with the context, it amounts only to a testimony of a fact relevant to the inquiry. *Ibid.*

13. *Same—Contributory Negligence.*—Where it is relevant to the inquiry in an action brought by an employee to recover damages caused by his falling upon ice alleged negligently to have been permitted to be upon a path the plaintiff was walking upon in the performance of his duties, testimony of the plaintiff that he did not cause his own fall, that he was as careful walking as he could be, is not objectionable as a statement of his opinion upon the fact, but is a statement of fact, and is admissable. *Ibid.*

14. *Evidence—Answer of Witness—Motion to Strike Out—Opinion—Testimony of Fact—Appeal and Error—Harmless Error.*—Where a witness gives testimony beyond the scope of a question asked him, objection to such part of the answer should be by motion to the trial judge to strike it out; but under the circumstances of this case it is held that the part of the answer objected to was immaterial to the issue and would not have constituted reversible error if objection had been properly taken and overruled in the lower court. *Ibid.*

15. *Evidence—Statutes—Statutory Powers—Prima Facie Case—Drainage Districts.*—It is within the power of the Legislature to change the existing rules of evidence so as to give to proof of certain facts the effect of establishing *prima facie* a fact in issue, if there is a reasonable relation between the two; and the enactment of sec. 5, ch. 287, Public-Local Laws 1915, amendatory of ch. 46, Public Laws 1911, known as the Drainage act, giving the itemized statement, verified by the tax collector of the district, the effect of *prima facie* evidence of the existence and legality of the taxes assessed as well as of the amount, is a valid exercise by the Legislature of its authority. *Drainage Comrs. v. Mitchell*, 324.

16. *Same—Constitutional Law—Federal Constitution.*—Sec. 5, ch. 287, Public-Local Laws 1915, known as the Drainage act, making the itemized statement, verified by the collector of the district, *prima facie* evidence of the existence and legality of the tax assessed, as well as of the amounts, etc., affords the taxpayer opportunity to rebut this evi-

EVIDENCE—*Continued.*

dence with his own evidence, before being called upon to pay, and does not deprive him of his property without due process of law contrary to the inhibition of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

17. *Evidence—Silence—Quasi Admissions.*—The silence of the grantee in a deed upon information given him concerning the purposes of the deed as stated by the grantor after he had executed it is not a *quasi* admission of the facts stated, the one stating them being a witness for the party seeking in his suit to declare the deed inoperative. *Campbell v. Sigmon*, 348.

18. *Evidence—Damages—Railroads—Grading Streets—Test of Opinion—Other Lots—Comparative Values.*—In an action to recover damages to plaintiff's lot caused by the defendant grading a street upon which it abutted, a witness testified as to the value of plaintiff's lot, and it is held that the trial court committed no error in permitting him to testify the price he realized from the sale of his own lot as a test of the value of his opinion, there being some evidence of the similarity of the two lots, and of their condition, surroundings and value. *Bennett v. R. R.*, 389.

19. *Evidence — Declarations — Lands — Possession—Interests.*—The rule of evidence making competent declarations as to the boundary of the owner of lands in possession, against his interest, applies to one claiming the lands under him. *Byrd v. Spruce Co.*, 429.

20. *Evidence—Husband and Wife—Deceased—Transactions.*—A husband is not disqualified for interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefitted by her will or in case of her intestacy being too remote. *McCurry v. Purgason*, 463.

21. *Evidence—Deceased Persons—Declarations.*—In an action to recover for services rendered a deceased person before his death, testimony as to his declarations made to a witness while the deceased was trading at his store are held, under the circumstances of this case, to be objectionable as hearsay evidence. *Ibid.*

22. *Evidence—Nonsuit—Trials.*—The evidence is considered in the light most favorable to the plaintiff upon the defendant's motion to nonsuit thereon. *Hopkins v. R. R.*, 485.

23. *Evidence—Witnesses—Stenographer's Notes—Deceased Persons—Declarations.*—The official stenographic report of the entire testimony of a witness, since deceased, taken at a former trial, and its correctness testified to by the stenographer, is properly received as evidence on a subsequent trial, and is not objectionable as to its form or as declarations of a deceased person. *Cooper v. R. R.*, 490.

24. *Evidence—Judicial Notice—Railroads—Grades—Speed of Train.*—In an action to recover damages for a personal injury alleged to have been caused by plaintiff's having been drawn within the vortex of defendant's rapidly moving train, it appeared from the evidence that the train was a freight train of forty-six cars drawn by two locomotives, which had stopped at a water tank, about 448 feet down a heavy grade from the place of the injury, and 200 feet after starting it was going at a speed of 6 or 8 miles an hour. *Held*, the Court will take judicial knowledge that the speed of the train at the place of

EVIDENCE—*Continued.*

the injury could not have been 25 or 30 miles an hour at the time the injury was inflicted, though there was some slight evidence to the contrary. *Davis v. R. R.*, 582.

25. *Evidence — Boundaries — Reputation — Declarations.* — The principle which admits evidence of the reputation as to corners or boundaries of lands applies to both public and private boundaries. *Threadgill v. Wadesboro*, 641.

26. *Evidence — Municipal Corporations — Streets — General Reputation.*— General reputation in a town of the width of its streets is incompetent in an action involving title, where it is not shown that the same did not take its rise at a comparatively remote period and *ante litem motam*. *Ibid.*

27. *Evidence — Footprints — Admissions — Corroboration.—Evidence of the* identity of tracks made at the scene of the crime with those made by the accused; being tried for murder, is competent, especially when corroborated by his confession. *S. v. Lowry*, 730.

28. *Evidence—Motions to Strike Out—Appeal and Error—Objections and Exceptions—Court's Discretion.*—It was discretionary with the trial judge to refuse to strike out testimony which has been admitted without objection, on the ground urged for error; and where money had been found at a certain house in consequence of a confession previously made by the prisoner on trial for murder, and the fact was relevant to the inquiry, a question asked by the court, assuming that the prisoner hid it there, and without objection at the time, except on a different ground than that urged on appeal, will not be held as reversible error. *Ibid.*

EXCEPTIONS. See Appeal and Error, 11, 15, 21, 31; Drainage Districts, 1, 8; Judicial Sales, 1; Reference, 2; Removal of Causes, 1.

EXECUTIONS.

1. *Executions—Levy—Realty—Possession.*—The sheriff has neither property nor a right to possession under a levy on land, but only a naked authority to sell, and his sale transfers only a right of property to the purchaser; and he cannot deliver the possession, under the execution, without the consent of the one holding it. *Clifton v. Owens*, 607.

2. *Executions—Levy—Personality—Possession.*—A levy of *fi. fa.* on chattels vests in the sheriff a special property which enables him to sell them after the return day, without a *ven. ex.*, and to deliver the possession to the purchaser. *Ibid.*

3. *Executions — Levy — Conversion — Life Estates — Distributions—Judgment Liens—Equity—Suits.*—Where under the equitable doctrine of conversion the legatees under a will are to take the proceeds of the sale of lands, after the falling in of a life estate, as personality, one of such distributees has no interest in the property, during the continuance of the life estate, which is subject to levy under a judgment against him, the right of the judgment creditor to subject such interest to the satisfaction of his lien arising only upon the death of the life tenant. Revisal, secs. 629, 630, have no application. *Ibid.*

4. *Executions—Levy—Conversion—Exemptions.*—Where after the falling in of a life estate in lands the lands are directed to be sold and the

EXECUTIONS—*Continued.*

proceeds distributed and held as personalty, and the judgment creditor then brings suit to subject the interest of one of the distributees to the satisfaction of his judgment lien, such distributee may claim his personal property exemption therein. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See Removal of Causes, 5.

Executors and Administrators—Personal Debt—Venue—Election of Plaintiff—Statutes.—An action brought to recover for services rendered personally to an administrator, not for a debt alleged to be due by the deceased or for the settlement of his accounts or upon his bond as administrator, is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. Revisal, sec. 424. *Craven v. Munger*, 424.

EXEMPTIONS. See Executions, 4.

EXPRESS COMPANIES. See Common Carriers, 2.

EXTINGUISHMENT. See Judgments, 10.

FALSE IMPRISONMENT.

1. *False Imprisonment — Malicious Prosecution — Arrest—Corporations—Principal and Agent—Criminal Law.*—An action for damages for false arrest and malicious prosecution will lie against a railroad company for the acts of its agents and employees done within the scope of their employment, without the necessity for plaintiff to show special authority from or ratification of such acts by the company. *Cooper v. R. R.*, 490.

2. *Same—Trials—Evidence—Questions for Jury.*—In an action for damages for false arrest and malicious prosecution against a railroad company there was evidence that the arrest was caused to be made by its shop superintendent, who had authority over the property—shop, yards, men at work—upon the charge that the accused feloniously entered the company's toolhouse, etc.; that private officers of the company, generally employed for such purposes, assisted in his prosecution before a justice of the peace, etc., before whom he was convicted, but afterwards acquitted in the Superior Court, etc.: *Held*, sufficient evidence of the authority of the company's employees to sustain a verdict rendered against the defendant company. *Ibid.*

3. *False Imprisonment — Malice — Evidence—Declarations—Res Gestae.*—In an action for false arrest and malicious prosecution against a railroad company, whose private detective took the accused to jail upon conviction before a justice of the peace, a declaration of the detective tending to show malice, while so acting, is part of the *res gestae*, and is competent evidence upon the trial. *Cooper v. R. R.*, 490.

FALSE PRETENSE. See Criminal Law, 3; Slander, 1, 2, 3.

FEDERAL CONSTITUTIONAL LAW. See Constitutional Law, 3.

FEDERAL DECISIONS. See Commerce, 3; Constitutional Law, 3.

FEDERAL INTERPRETATION. See Commerce, 7.

FELONY. See Convicts; Criminal Law, 19; Homicide, 22.

FERTILIZERS. See Nuisance, 3.

FINDINGS. See Appeal and Error, 1; Elections, 1, 2; Instructions, 7.

FOOTPRINTS. See Evidence, 27.

FOREIGN WILLS. See Wills, 29.

FORMER JEOPARDY. See Criminal Law, 17; Homicide, 17, 18.

FRANCHISES. See Municipal Corporations, 7.

FRATERNAL ORDERS. See Insurance, 15, 16; Principal and Agent, 5.

FRAUD. See Bills and Notes, 1, 5; Deeds and Conveyances, 12, 13; Equity, 3; Judgments, 17, 18; Limitation of Actions, 7; Pleadings, 9, 14.

GIFTS. See Deeds and Conveyances, 2.

GRANTS.

1. *Grants—State's Lands — Copies — Seal of State — Presumptions—Evidence—Constitutional Law—Deeds and Conveyances.*—An abstract of a grant of State's land by the Secretary of State imports the regularity of its issuance and that the constitutional mandate of affixing the seal to the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. *Howell v. Hurley*, 401.
2. *Grants—Entries—Seal of State—Presumptions—Interpretation of Statutes.*—The Legislature has the power to change the rule of evidence when the party affected has been given ample time to protect his rights under the statute, and ch. 249, Laws 1915, declaring that certified copies of entries of grants of the State's lands may be received in evidence on trial involving title to the lands therein described, under the presumption that the Great Seal of the State was affixed to the original grant, in the absence of evidence to the contrary, is constitutional and valid. *Ibid.*

GUARANTY. See Contracts, 8.

HANDWRITING. See Evidence, 8.

HEALTH. See Criminal Law, 13, 14.

HIGHWAYS. See Road Districts; Roads and Highways.

HOMESTEAD. See Deeds and Conveyances, 5.

HOMICIDE. See Criminal Law, 13, 23.

1. *Homicide — Defenses—Reasonable Apprehension—Assault.*—A homicide is not excusable unless it reasonably appeared to the accused that the deceased intended to kill her or her child *in ventre sa mere*, or to do either of them great bodily harm; or that the assault upon her

HOMICIDE—*Continued.*

would have resulted in her death, or great bodily harm, or that of her child, the reasonableness of this apprehension being a question for the jury under the evidence; and a homicide is not excused by the fear that a mere assault would be committed by the deceased at the time. *S. v. Hand*, 703.

2. *Homicide—Matters in Mitigation—Instructions—Inferences—Questions for Jury.*—Where the accused, on trial for a homicide, relies upon the defense that the act was committed by him with reasonable apprehension of an assault by the deceased, etc., a prayer for instruction which sets forth the testimony relied upon and asks the court to instruct the jury to acquit the accused if such testimony is found by the jury to be true, leaving out of consideration the inferences to be drawn therefrom, is an improper one. *Ibid.*

3. *Homicide—Deadly Weapon—Malice—Presumptions—Burden of Proof —Instructions.*—The accused, on trial for homicide, has the burden upon him of proving matters in mitigation of the degree of the offense, when the homicide has been shown to have been committed by him with a deadly weapon; and under the circumstances of this case it is held that the trial judge correctly charged the jury that a provocation amounting to an assault would reduce the crime to manslaughter. *Ibid.*

4. *Homicide—Malice—Mitigating Facts—Lesser Offenses—Instructions.*— Where if certain facts and circumstances upon a trial for homicide are found by the jury to be true, such would remove the presumption of malice from the killing with a deadly weapon, a requested instruction predicated thereon, with direction to bring in a verdict of acquittal should be refused, for the jury may convict of a lesser crime than murder. *Ibid.*

5. *Homicide—Deceased Persons—Evidence.*—One accused of a homicide is not forbidden to testify as to what occurred between the deceased and himself, constituting matters of defense, the rule regulating such evidence in civil actions not applying thereto. *Ibid.*

6. *Homicide — Mistaking Deceased's Identity — Robbery — Evidence.*— Where upon a trial for a homicide there is evidence tending to show that the defendants laid in wait along a country road in the dark of the evening and killed the deceased and robbed him; that he was driving a bay horse to a top buggy at the time, and that another person, an employee of a railroad, had been paid $125 by the railroad company at its usual time for paying off its employees, which custom was known in the city, a railroad center, it is competent to show that such employee also owned and drove a bay horse to a top buggy and had gone along the road ahead of the deceased, especially when there is evidence of declarations by the accused that they had missed their man, who had gone on ahead driving a bay horse. *S. v. Walker*, 716.

7. *Same—Motive.*—Where the evidence upon a trial for murder tends to show that the accused in the dark of the evening killed the deceased under the mistake that he was another whom they intended to rob, it is not necessary that motive for the homicide be shown. *Ibid.*

8. *Homicide—Lying in Wait—Murder, First Degree—Concealment—Dark —Evidence.—For a homicide committed by "lying in wait" to be* murder in the first degree it is not necessary that the accused should

HOMICIDE—*Continued.*

have concealed himself at the time, and it is sufficient if he placed himself alongside a country road after the dark of the evening, when he could not be recognized by one eight or ten feet off, and killed the deceased while he was passing the place. *Ibid.*

9. *Homicide—Murder, First Degree—Evidence—Identity of Accused—Instructions—Trials.*—Where all the facts in evidence tend to show that a murder in the first degree had been committed, and the issue of fact for the jury is only one of identity of the accused, a charge of the judge that the jury should return either a verdict in the first degree or acquit the accused, when the burden and degree of proof are properly placed and defined, is a correct one. *Ibid.*

10. *Same—Polling Jurors—Answers of Jurors.*—Where the court has correctly charged the jury, upon the evidence, on a trial for homicide, that their verdict should find the accused "guilty of murder in the first degree or acquit him," and in rendering the verdict the foreman gave the answer "Guilty," and, replying to the question of the court, said "Guilty of murder in the first degree," and, upon polling the jury at the request of the prisoner, each juror answered "Guilty," without defendant's request for further reply, a judgment of guilty of murder in the first degree is properly entered. *Ibid.*

11. *Homicide — Insanity — Declarations—Evidence of Sanity—Subsequent Statements.*—The defense of insanity being relied upon on a trial for murder, it is competent for the sheriff having the custody of the accused to testify, from what he had seen of the accused while in jail, his opinion of whether the accused knew right from wrong; and testimony of this character is not objectionable because it was not confined to the exact time of the killing. *S. v. Cooper*, 719.

12. *Homicide—Insanity—Sufficiency of Evidence.*—In order to render the defense of insanity available as a defense for committing murder, it must have been sufficient at the time of the homicide to render the accused incapable of understanding the nature and quality of the act he was about to commit or to distinguish between right and wrong, either generally or with reference to the particular act. *Ibid.*

13. *Homicide — Confessions — Threats of Lynching — Consequent Facts.*—Confessions of murder made by the accused, under threats of lynching, of which he was aware, will not be received in evidence against him on the trial, though incriminating matters brought to light in consequence thereof are competent, as, in this case, where robbery as well as a homicide was committed, the finding of identified money, the bloody stick used, and the stem and roots of the bush from which the stick had been cut, bearing upon other evidence tending to fix the crime upon the accused. *S. v. Lowry*, 730.

14. *Homicide — Evidence — Voluntary Confessions.*—Voluntary confessions of murder made by the accused to the officer in charge, while in jail, are competent evidence against him on the trial; and this rule of evidence is not affected by the fact that the prisoner had previously made confessions, in another State, of the crime, when threatened with being lynched there. *Ibid.*

15. *Same—Several Prisoners—Competency as to Each.*—Voluntary confessions made by two prisoners accused of murder are competent as evidence upon the trial when confined by the court to the prisoner making them, or made by one in the presence of the other. *Ibid.*

HOMICIDE—*Continued.*

16. *Homicide—Nol. Pros. With Leave—Capias.*—Where a *nol. pros.* with leave is entered for one indicted of a homicide, who is thereupon and before the trial of the action discharged from the prison without being required to give bond or recognizance, the accused may thereafter be arrested under the capias issued on the bill of indictment; and the solicitor may elect to try him for murder in the second degree, instead of the greater offense charged. *S. v. Smith*, 742.

17. *Homicide — Nol. Pros. With Leave — Former Jeopardy — Impaneling Jury—Issues.*—Where a *nol. pros.* with leave is entered as to one charged with homicide, to which he has pleaded not guilty, and he is again arrested upon a capias and held to trial for the offense charged, and it appears that no jury has theretofore been impaneled to try him, his plea of former acquittal is untenable, for no jeopardy attaches until a jury has been impaneled, and under such circumstances there is nothing issuable for the jury. *Ibid.*

18. *Homicide—Pleas—Former Jeopardy—Burden of Proof.*—The burden of proof is on the defendant accused of homicide to show former acquittal when this is relied on by him as a defense. *Ibid.*

19. *Homicide—Evidence—Testimony of One of Two Accused.*—Where two persons are accused of the same homicide, one confesses and a *nol. pros.* with leave is entered as to the other, who is afterwards brought to trial, the unsupported evidence of the one who had confessed is sufficient to sustain a judgment of conviction of the other. *Ibid.*

20. *Same—Instructions—Party Interested — Caution to the Jury.*—Where one of two persons accused of a homicide has confessed and testifies against the other at a subsequent trial, while serving his sentence, objection to the charge of the court is untenable that he failed to caution the jury as to the credence to be given testimony of this character, when it appears from his charge that he instructed them particularly that in passing on the evidence of that witness they must consider the interest he had in the matter of getting a pardon or a reduction of his sentence in case a conviction was had. *Ibid.*

21. *Evidence — Homicide — Declarations—Res Gestae.*—Declarations to be competent as a part of the *res gestae* must not relate to a past completed transaction; and declarations of the deceased as to the defendant's careless handling of a pistol which accidentally fired and caused the wound resulting in his death are not competent on the trial for the homicide, when not made at the time of the shooting, but a short time thereafter. *S. v. Peebles*, 763.

22. *Homicide—Murder—Solicitors—Demand for Conviction in Second Degree—Trial—Capital Felony.*—Where the defendant is indicted for murder in the first degree and the solicitor at the time of calling the case for trial announces he will not ask for a verdict in the first degree, and an entry of record is accordingly made, the trial is not for a capital felony. *S. v. Upton*, 769.

23. *Homicide—Murder—Mistrials—Court's Discretion—Appeal and Error.* Where, without the knowledge of the court or the parties, and after the jury has been selected, sworn, and impaneled, it is discovered that one of them is disqualified to act, for nonresidence in the State, and the trial is for a homicide less than a capital felony, it is within the sound discretion of the court to withdraw a juror and order a

HOMICIDE—*Continued.*

mistrial, which is not subject to review on appeal. If for a capital felony, the court may withdraw a juror and order a mistrial, when "necessary to attain the ends of justice," and upon exception duly taken, find the facts, from which an appeal lies as a matter of right. If no exception is aptly taken, it is within the court's discretion to permit, thereafter, the objecting party to challenge the juror. *Ibid.*

24. *Homicide—Trials—Evidence—Letters.*—Upon a trial of a wife for the murder of her husband, with evidence tending to show her guilt and knowledge of its having been committed by another, it is competent to show she had in her possession a letter immaterial to the issue, which she claimed to have received from him after his death, for the purpose of sustaining her statement that he was then on a visit to his sick mother. *S. v. Christy*, 772.

25. *Homicide — Evidence — Confession.*—Where several defendants are on trial for a homicide, and confessions of one are introduced in evidence, it would not be reversible error for the trial judge to omit to instruct the jury that such were not competent against the others, unless the appellant asks at the time of the admission that their purpose be so restricted. Supreme Court Rules, 164 N. C., 548. *Ibid.*

26. *Homicide—Conspiracy—Trials — Evidence — Questions for Jury.*—Evidence of a conspiracy to commit murder of the husband of the *feme* defendant is sufficient which tends to show, on the part of the man, that he had been living unlawfully with the woman; that the deceased ran off with the woman and married her; that he followed them to another State, where he visited her, and they laid plans to kill her husband, who was murdered in her home when the prisoner was present and with his knowledge, and that he concealed and carried off the body, weighted it and threw it in a creek, etc; and on the part of the woman, that she secretely received the man at her house and in her room, etc.; that the crime was committed in her home; that she made no outcry, knowing the deed was being done, and furnished the trunk in which the body was concealed and saw it carried away, and that she stated she had "planned the murder," etc. *Ibid.*

27. *Homicide—Self-defense — Assault Provoked — Quitting the Combat.*—One who has entered willingly into a fight in the sense of its being voluntary and without legal excuse, or who has wrongfully used language calculated or intended to provoke the difficulty which presently ensued, may not maintain the position of perfect self-defense for the killing of another, unless at a time prior to the killing he had quitted the combat within the meaning of the law. *S. v. Kennedy*, 169 N. C., 334, cited and applied. *S v. Crisp*, 785.

28. *Homicide—Assault Provoked — Abusive Language — Test.*—A test of the right of perfect self-defense is whether, if the homicide had not occurred, the defendant would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which he has provoked or entered into the fight. Such instances mentioned and discussed by HOKE, J. *Ibid.*

29. *Homicide — Assault Provoked — Self-defense — Abusive Language — Fighting Willingly.*—Where the defendant on trial for a homicide has used language calculated to provoke a breach of the peace, and at the commencement of the difficulty with the deceased had made

HOMICIDE—*Continued.*

hostile and threatening demonstration with a weapon, which he had taken from his pocket and kept convenient for use during the ensuing dispute, and thereafter the deceased sprang to possess the weapon, which fired twice during the scuffle, the second shot inflicting the mortal wound, the plea of a perfect self-defense may not be sustained, it appearing that the prisoner entered the fight willingly and continued willingly therein. *Ibid.*

30. *Homicide — Self-defense — Abusive Language — Assault Provoked —* Trials—Questions for Jury.—Where the plea of a perfect self-defense is interposed by a defendant on trial for a homicide, and it appears that he had used violent and insulting language to the deceased immediately preceding an assault upon him, the question as to whether the language used was calculated or intended to bring on the assault, under the surrounding circumstances, is generally one for the jury. *Ibid.*

HUSBAND AND WIFE. See carriers of Goods, 5; Deeds and Conveyances, 2, 5, 8, 21; Estates, 5; Evidence, 20; Judgments, 11; Married Women, 5.

1. *Husband and Wife—Lands—Right of Survivorship—Partition—Judgment—Divorce—Second Partition—Reformataion of Deed — Estoppel.* Where a husband and wife are seized of lands by entireties with the right of survivorship, and bring proceedings for partition against another, who owns the tract in common with them, and the question of title has not been at issue either as between the husband and wife or between them and the third person, it is *Held*, that thereafter, upon the granting of an absolute divorce, the judgment in the partition proceedings will not estop the wife, in another proceeding for partition brought by her husband's grantor, from asserting her right to have the deed made to her and her husband corrected for the mistake of the draftsman in not making the conveyance to her alone, and thus raising the issue of title in the second proceeding. *Weston v. Lumber Co.*, 162 N. C., 179, cited and applied. *McKimmon v. Caulk*, 54.

2. *Husband and Wife—Estates by Entireties—Creditors—Fraud.*—Where a conveyance of lands is made to the husband and wife in entireties, expressing a valuable consideraiion, it will not be set aside at the suit of the husband's trustee in bankruptcy, alleging it was purchased with the money of the husband, while insolvent, for the purpose of defrauding his creditors in having it conveyed to him and his wife, there being no evidence of the insolvency or fraud of the husband at the time of the deed, and evidence that he was then indebted to his wife. *Finch v. Cecil*, 114.

3. *Same—Retaining Property—Interpretation of Statutes.*—A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. Revisal, sec. 962. *Ibid.*

4. *Husband and Wife — Wife's Services — Implied Consent.*—Before the passage of the Martin act the husband, by his conduct, could give his implied consent that the wife should receive compensation for her services rendered to another, as where he joins in his wife's action to recover them, etc. *McCurry v. Purgason*, 463.

INDEMNITY. See Insurance, 1, 2, 4.

INDICTMENT. See Criminal Law, 4; Intoxicating Liquors, 6; Landlord and Tenant, 1; Statutes, 6; Constitutional Law, 4.

1. *Indictment — Motion to Quash — Insufficiency—Seduction—Interpretation of Statutes.*—Where an indictment for seduction under promise of marriage conforms with the statute except in the charge that the prosecutrix was an "innocent and virtuous" woman, omitting the word "and," the omission does not make the indictment fatally defective, for the expressions used supply the omission, and a motion to quash will be refused; and as a comma between the words "innocent" and "virtuous" would have the same effect, it would be the same as if the indictment had been imperfectly punctuated, which is not material. Revisal, secs. 3254, 3255. *S. v. Ratliff*, 707.
2. *Indictment—Sufficiency—Judgment—Motion in Arrest—Interpretation of Statutes.*—A motion in arrest of judgment in a criminal case, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. Revisal, sec. 3254. *Ibid.*
3. *Indictment — Courts — Duplicity—Courts—Criminal Law.*—An indictment may charge several offenses arising out of the same transaction, and it is discretionary with the trial judge to consolidate two bills against the same accused and treat them as separate counts of the same bill; and though the indictment may be bad for duplicity, the error will be cured by a *nol. pros.* as to all but one offense, or by a verdict. *S. v. Stephens*, 745.
4. *Indictment — Less Offense—Conviction—Accessory—Attempt to Commit Arson.*—A person charged with arson may be convicted of the less offense of an attempt to commit arson (Revisal, sec. 3244); but the question does not arise in this case whether he may be charged as an accessory before the fact and convicted of an attempt, the judge having charged the jury that they could not convict of the first offense. *Ibid.*
5. *Indictment—Attempt to Commit Arson—Defects—Motions — Supreme Court — Specific Averment — Separation—Procedure.*—The defendant may move in the Supreme Court in arrest of judgment rendered on an indictment which is fatally defective; but on the charge of an attempt to commit arson, on the ground that the means by which the offense was committed was not specifically averred, the motion will be refused when sufficient matter appears upon which to rest the judgment (Revisal, sec. 3254), the proper course being to request the trial judge, in his discretion, to order a bill of particulars, under the provisions of Revisal, sec. 3244. *Ibid.*
6. *Indictment—Several Counts—Election.*—Where there is more than one count under an indictment in a criminal matter relating to the same transaction, the State is not required to elect before the close of the evidence, and the question of whether an election will be ordered rests within the discretion of the trial judge. *Ibid.*

INDORSEMENT. See Bills and Notes, 6.

INDORSER. See Bills and Notes, 3, 4.

INJUNCTION. See Appeal and Error, 26; Costs, 2; County Commissioners, 4; Deeds and Conveyances, 23; Drainage Districts, 1; Equity, 4; Mortgages, 1; Municipal Corporations, 2, 3; Public Roads, 3; Roads and Highways, 1.

1. *Injunction — Affidavit — Supreme Court — Municipal Corporations — Cities and Towns — Sidewalks — Paving.*—Where a property owner seeks to enjoin the collection of an assessment on his property for the cost of paving a sidewalk of a street along his lot, the affidavits filed therein may be examined by the Supreme Court, and in this case it is held that the order should not have been continued to the hearing upon the conflicting evidence. *Marion v. Pilot Mountain*, 118.

2. *Injunction—Work Completed—Action at Law—Damages—Allegations —Municipal Corporations — Street Railways.*—Where an order restraining the building of a street railway has been refused and the work completed, the Supreme Court, on appeal, will not uselessly enjoin its completion, or the running of a few cars thereon, but will leave the plaintiff his action for damages to be ascertained at the final hearing, in the absence of allegation of irreparable or serious injury. *Turner v. Public-Service Co.*, 172.

3. *Injunction—Appeal and Error—Act Committed—Appeal Dismissed.*— On appeal in an action to restrain the foreclosure of a mortgage, with power of sale, on the ground that the defendant induced the plaintiff to execute it when the latter was too intoxicated to have knowledge at the time of what he was doing, and it appears that the sale of the land was made pending the appeal after the restraining order had been dissolved and no stay bond given, the Supreme Court will dismiss the appeal, the act complained of having been committed and there being nothing upon which the injunction could operate. *Kilpatrick v. Harvey*, 668.

4. *Injunction—Appeal and Error—Appeal Dismissed — Mortgage Sale— Pleadings — Lis Pendens — Cause Retained — Practice.*—Where a restraining order for the sale of land under mortgage has been dissolved, a sufficient complaint filed before the sale operates as *lis pendens* to the purchaser, and affects him with notice of the plaintiff's rights, as to which the cause will be retained. *Ibid.*

INSANE PERSONS. See Wills, 9; Homicide, 12.

INSOLVENCY. See Bankruptcy, 2, 3, 4.

INSPECTION. See Electricity.

INSTRUCTIONS. See Appeal and Error, 16, 29; Carriers of Goods, 9; Homicide, 2, 3, 4; Insurance, 17; Master and Servant, 11, 16, 19, 21; Mechanics' Liens, 3; Negligence, 3, 4, 5; Trials, 3; Wills, 18, 19; Homicide, 20; Trials, 7.

1. *Instructions — Contract — Breach — Testimony of One Witness — Evidence.*—Where suit is entered for damages for breach of a contract of employment for a year, against a corporation which denies liability on the ground that the contract had been terminated by the mutual consent or agreement of the parties, it is reversible error for the trial judge to charge the jury that if they believed the testimony of an officer of the company, which was capable of the construction that the defendant had wrongfully breached its contract, to find the

INSTRUCTIONS—*Continued.*

issue in plaintiff's favor, there being other evidence in behalf of the defendant's contention. *Bowman v. Trust Co.*, 301.

2. *Instructions — Conflicting Charge — Corrections — Appeal and Error.*— Where damages are sought in an action for burning a barn, the plaintiff is only required to establish his case by the greater weight of the evidence; and where in his charge the court has instructed the jury variously as to the degree of proof required, that the plaintiff must satisfy them that the defendant's intestate did burn the property, that the evidence must be clear, convincing and satisfactory; that it must satisfy them by its greater weight, it constitutes reversible error; and this error is not sufficiently corrected when, afterwards, at the request of the jury for enlightenment, he correctly charges them upon the question of the burden of proof without calling their attention to the former charge and specifying the error therein, which is required to be corrected. *Champion v. Daniel*, 331.

3. *Instructions—Construed as a Whole—Appeal and Error.*—In an action to recover the value of personal services rendered a deceased person the judge charged the jury that the burden of proof was on the plaintiff to offer evidence "sufficient by its greater weight to satisfy them" of the truth of her allegations. Construing this excerpt with the charge in this case as a whole, no reversible error is found. *McCurry v. Purgason*, 463.

4. *Instructions—Railroads—Condemnation—Measure of Damages—Statement of Contentions.*—Where the court substantially instructs the jury in condemnation proceedings for railroad purposes that the measure of damages is the difference between the market value of the land before and after its appropriation for a right of way, it will not be considered as error that, in stating the contentions of the parties, he said more or less about the value of the land for residential, municipal, and industrial purposes. *Land Co. v. Electric Co.*, 674.

5. *Instructions—Railroads—Condemnation—Character of Lands — Appeal and Error.*—It was correct for the judge to refuse to charge that the land over which the defendant railway company had condemned a right of way was unsuitable for high-class residential development, under the evidence in this case. *Ibid.*

6. *Instructions—Evidence—Inferences—Speculation.* — An instruction by the court that the jury should make its decisions upon what the witnesses say, "with proper inference and deduction by the use of your own sense and judgment from what they say or fail to say," is not objectionable on the ground that the jury were told to speculate or imagine what had occurred. *S. v. Hand*, 703.

7. *Instructions—Construed as a Whole—Criminal Law—Findings Upon Evidence—Appeal and Error.*—Where the trial judge has instructed the jury that one accused of murder must satisfy them from the evidence that he did not have mental capacity to commit a crime, it is not error for him to have omitted the words "from the evidence," in a sentence to that effect immediately following; for the charge should be construed as a whole, in the connected way given to the jury, and upon the presumption that the jury will not overlook any portion of it. *S. v. Cooper*, 719.

INSTRUCTIONS—*Continued.*

8. *Instructions—Oral Requests—Appeal and Error.*—Prayers for special instructions are required to be in writing, and the failure to give oral requests therefor will not be considered on appeal. *S. v. Wilkes*, 735.

INSURANCE. See Issues, 1; Principal and Agent, 1, 5; Trials, 2; Trusts and Trustees, 6.

1. *Insurance, Fire—Policy Contract—Stipulation as to Suit—Limitation of Actions—Disability—Interpretation of Statutes.*—The provision in the standard form of fire insurance policy, sanctioned by statute, Revisal, section 4809, that suit thereon will not be sustained unless commenced within twelve months after the fire, is valid, and resting by contract between the parties, is not regulated by the statute of limitations, and the disabilities which stop the running of the statute, Revisal, section 362 (3), have no effect upon it. *Hence*, the imprisonment of the insured will not affect his right to recover when he has delayed his action for more than a year. *Holly v. Assurance Co.*, 4.

2. *Insurance, Life—Policies—Parol Contracts—Insurance Commissioner—Reinsurance—Evidence—Questions for Jury.*—A valid contract for life insurance may rest in parol unless in contravention of some statutory provision or some principle of public policy; and where there is evidence tending to show that an insurance company, having many policyholders in this State, has been condemned in its methods by the Insurance Commissioner and its further continuance in business is prohibited, and its manager organized a new company to take over the business of the old company, collecting the premiums for such insurance on the old policies without issuing new ones except in acquiring new business; that it published this method by circular-letters to the policyholders in the retired company and to the Insurance Commissioner, who thereafter ordered that the policies in the new company should issue, by that company to take up the policies issued by the old or retired one: *Held*, sufficient to be submitted to the jury upon the question whether the new company had agreed to become liable upon the policies of the retired company. *Morgan v. Fraternal Assn.*, 75.

3. *Same — Old Policies in Force — Death of Insured — New Policies.*—Where an insurance company has been formed to take over the policies of a company whose continuance in business in North Carolina has been forbidden by the Insurance Commissioner, and which immediately puts into effect a method by which the old policies were continued in force and the premiums therefor collected by the new company, but which method was abandoned upon order of the Insurance Commissioner, and new policies accordingly issued: *Held*, that a policy of insurance thus continued in force by the new company and maturing by the death of the insured before the issuance of the new policies directed by the Insurance Commissioner, was a valid and binding obligation on the new company which had taken it over in the manner stated. *Ibid.*

4. *Insurance—Orders of Commissioner—Protection to Policyholders—Defenses.*—An order of the Insurance Commissioner that a life insurance company issue new policies for those it carried in force for a

INSURANCE—*Continued.*

company prohibited by him from continuing to do business in this State is made for the protection of the policyholders, and cannot be taken advantage of by the insurer in denying an obligation arising upon the maturity of the old policy by the death of the insured before the new policies were issued. *Ibid.*

5. *Insurance, Life—Loan Note—Limitation of Actions.*—Where the insurer has accepted a loan note with the express provision that its amount shall be deducted from the policy of life insurance issued by it, at maturity thereof, and the policy has since matured, the running of the statute of limitations cannot affect the right of the insurer to retain the money due on the note. *Cowles v. Assurance Society*, 368.

6. *Insurance—Loan Note—Consideration—Burden of Proof.*—A loan note expressing upon its face "for value received," and given to an insurer of life, imports a consideration therefor and is *prima facie* evidence thereof, whether the note is negotiable or not; and where the note also states that its amount is to be deducted from the matured policy, its execution, and that of the policy and application therefor, are admitted, the burden of proof is on the plaintiff, seeking to invalidate the note for want of consideration, to show the absence thereof. *Ibid.*

7. *Same—Exchange of Policies.*—A note given by the insured for the difference between the amount of the premiums paid to the date of the issuance of a new for the old policy, upon the insured's and the beneficiary's request, the new policy, in its terms and provisions, being more valuable to the insured and the beneficiaries, is for a valuable consideration, and under the circumstances of this case the transaction is not invalid as being against public policy. *Ibid.*

8. *Same — Contracts — Courts.*—A note given for the difference in past premiums on a policy of life insurance, which policy by agreement of the parties is contemporaneously taken up and replaced by a new one of greater advantages to the insured and the beneficiary, but bearing a larger premium, and specifying that the note shall be paid out of the proceeds of the new policy when it matures, is construed as a part of the policy contract, which the courts are not at liberty to change or vary, when not contravening public policy. *Ibid.*

9. *Insurance—Loan Notes—Possession—Presumption — Payment — Pleadings—Evidence.*—The insured before his death gave the insurer a loan note to be paid out of his policy of life insurance at its maturity, and, alleging the want of consideration, and not payment, the plaintiff in his action on the policy seeks to show payment of the note. The note was introduced in evidence by the plaintiff, but was in defendant's possession and procured on plaintiff's notice: *Held*, under this and other circumstances of the case, the plaintiff failed to show by a scintilla of evidence that the note had been paid. *Ibid.*

10. *Insurance, Life—Application—Serious Illness—Questions for Jury.*—Where the applicant for a policy of life insurance has been required to state his last serious illness, and there is conflicting evidence as to whether a certain illness of his was of a serious character, and the insurer seeks to invalidate the policy on that ground, it presents a question for the determination of the jury. *Schas v. Assurance Society*, 420.

INSURANCE—*Continued.*

11. *Same—Serious Injury — Temporary Illness — Permanent Injury.*—An illness of the insured sufficient to invalidate a policy of life insurance, where the insured contends that the applicant had made a false statement thereof in his application for the policy, must be of such character as to permanently affect the health of the insured, and not such as is transitory or does not affect the desirability of the risk, and expert medical evidence that a habit of the insured, existing before the application was made, by the impairment of his health produced a serious illness, is insufficient to invalidate the policy, it having been established by the verdict of the jury that it had not done so. *Ibid.*

12. *Insurance—Indemnity — Repudiation of Liability — Notice of Suit.*—Where the indemnified notifies the indemnity company of an action about to be commenced to recover damages for a wrongful death covered by the policy, and the company denies liability for the death on the ground that the employee was under the lawful age required by our statute, and therefore not within the meaning of the policy, the denial of such liability renders it unnecessary for the indemnified to comply with the terms of the policy in giving notice of the commencement of the action, so as to afford the company an opportunity to defend, and recovery may not successfully be resisted on that account. *Lowe v. Fidelity and Casualty Co.*, 445.

13. *Insurance—Indemnity—Loss.*—It is necessary for the plaintiff to show that he has sustained the loss he seeks to recover in his action against an indemnifier against loss, and not alone that a judgment has been obtained against him for an injury to an employee covered by the bond. *Ibid.*

14. *Insurance—Indemnity—Breach—Defense of Suit — Costs — Attorney's Fees—Contracts.*—Where the insurer has refused to defend an action contrary to its agreement contained in its bond indemnifying the insured against loss for the negligent injury to or death of an employee, etc., the assured, in its action on the bond, may recover the costs, including attorney's fees, he has incurred in thus being forced to defend the action. *Ibid.*

15. *Insurance—Fraternal Orders—Rules—Waiver—Estoppel.*—A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and by-laws, unless the defect has been waived by the company or it is in some way estopped from insisting on the forfeiture. *Robinson v. B. of L. F. and E.*, 545.

16. *Same—Dual Relationship—Insurer and Insured.*—A member of a fraternal order holding a policy of life insurance or benefit certificate in its insurance department occupies a dual relationship towards the company; for, as a member he is bound by the rules and proceedings of the order regularly taken, and as a holder of one of the policies he stands towards the company, under his policy, in the relationship, in most respects, of insurer and insured, and subject to the principles prevailing in that class of contracts. *Ibid.*

17. *Insurance—Principal and Agent—Imputed Knowledge—Local Agents—Issues—Instructions—Appeal and Error.*—In this action to recover upon a policy of life insurance claimed by the defendant to be invalid because of material and false representations made in the appli-

INSURANCE—*Continued.*

cation for it, it is *Held*, that knowledge of the local medical examiner authorized to ascertain the facts was knowledge imputable to the company, and that the data on file at the home office may also affect the company with notice. *Ibid.*

INSURANCE COMMISSIONER. See Evidence, 8; Insurance, 4.

INTEREST. See Clerks of Court, 3.

INTERSTATE. See Commerce, 1, 2, 3, 6.

INTERVENORS. See Drainage Districts, 2; Judgments, 6; Pleadings, 9.

INTESTACY. See Wills, 15.

INTOXICATING LIQUORS. See Statutes, 5, 6, 9; Constitutional Law, 4; Criminal Law, 24, 25.

1. *Intoxicating Liquors — Claim and Delivery — Criminal Law — Judgments.*—Where the plaintiff has been convicted of violating section 7, ch. 97, Laws of 1915, for unlawfully receiving and having in his possession 40 gallons of wine to serve at the table of his boarding-house, though no extra charge is made for the wine, and from this judgment he has not appealed, he cannot in a civil action of claim and delivery obtain possession of the wine from an officer having it in his custody under the order of court to destroy it, and it is the duty of the officer to do so, under the judgment in the criminal action not appealed from. *Felia v. Belton*, 112.

2. *Same—Custodia Legis—Interpretation of Statutes.*—Where the defendant in a criminal action has been convicted of unlawfully having 40 gallons of wine contrary to the provisions of chapter 97, Laws of 1915, and the wine is in the hands of an officer of the court, it being *in custodia legis*, the defendant may not recover it in a civil action against such officer; nor will the courts adjudicate that the officer deliver the wine to the plaintiff, for as the officer would act in violation of the statute in voluntarily doing so, the courts will not compel him. *Ibid.*

3. *Intoxicating Liquors—Interstate Commerce—Federal Regulation—Repealing Acts—State Laws—Statutes.*—The Webb-Kenyon act, withdrawing from the protection of interstate commerce the shipment of intoxicating liquors where such are intended to be received in violation of the State law, etc., is a constitutional and valid law. *Glenn v. Express Co.*, 286.

4. *Intoxicating Liquors—Police Powers—Constitutional Laws.*—The sale of intoxicating liquors affects the morals, health and sobriety of the people of a locality, and falls within the police powers inherent in a State, and which the States have not delegated in the Constitution to the Federal Government. *Ibid.*

5. *Same—Personal Use—Interpretation of Statutes.*—Our statute, ch. 87, Laws 1915, enacted in accordance with the police powers and the declared public policy of the State with reference to prohibiting the manufacture and sale of intoxicating liquors, etc., is in accord with the Webb-Kenyon act of Congress, and not in violation thereof, prohibiting the carrier to transport and the consignee to receive more than one quart of intoxicating liquor within the period of fifteen

INTOXICATING LIQUORS—*Continued.*

days; and this position is not affected by the fact that certain consignees may want the liquor for their own personal use, it being within the power of the Legislature to prevent an evasion of the law by persons who may make such claims, but who, in fact, intend to violate the law by making sales or unlawfully disposition of the liquor to others. *Ibid.*

6. *Intoxicating Liquors—Indictment—General and Local Statutes—Interpretation of Statutes—Criminal Law.*—A charge against the defendant under indictment in a recorder's court, that he did unlawfully, etc., on a certain day, violate the law by selling less than two gallons of intoxicating wine to a certain specified person, for a stated price paid, contrary to the form of the statute and against the peace and dignity of the State, refers to all the relevant statutes on the subject of prohibition; and where a local law exists making sales of such intoxicants on the premises, in packages, etc., unlawful if less than two gallons each, and no mention is made of the local statute in the charge, a conviction may be had under the general statutes relating to prohibition, making unlawful a sale of this character of less than two and a half gallons to the package. Sec. 7, ch. 71, Laws 1908; sec. 8, ch. 44, Laws 1913. *S. v. Johnson*, 685.

7. *Intoxicating Liquor—Possession of Agent—Prima Facie Case.*—The possession of the agent, for the one accused of violating our prohibition law, of more than one gallon of intoxicating liquor is sufficient to make out a *prima facie* case of guilt, under the provisions of section 2, chapter 44, Public Laws 113, carrying the issue to the jury. *S. v. Blauntia*, 749.

8. *Same—Barrels Marked Potatoes — Railroad's Possession — Guilt—Circumstantial Evidence.*—It is sufficient evidence to make out a *prima facie* case of guilt of one accused of violating the prohibition law in having in his possession more than one gallon of intoxicating liquor, when it tends to show that the delivering railroad had in its possession a shipment of barrels marked potatoes addressed to the accused as consignee, but which contained several gallons of liquor covered at top and bottom with potatoes; that the next day the officers of the law found at the defendant's residence similar empty barrels, but with the marks thereon obliterated and empty bottles similar to those in the barrels they had seized; and with testimony of draymen that they had obtained from the railroad similar barrels upon a bill of lading given them by the defendant and delivered at his home, and that the defendant had signed the warehouse receipts for two barrels of potatoes. *Ibid.*

9. *Same—Prisoner Not Identified—Identification.*—There being evidence in this case that the defendant, accused of violating the prohibition law, had been receiving by freight barrels marked potatoes, but containing more than one gallon of intoxicating liquor, testimony of a drayman that he had been told by a man, whom he could not identify, to haul similar barrels to the ones seized to a certain address, being that of the accused, with other corroborative evidence, is held relevant in establishing a *prima facie* case of defendant's guilt in having more than one gallon of liquor on hand, both on the principal issue of guilt and on the question of whether the liquor seized in the railroad's possession, and purporting to be consigned to the defend-

INTOXICATING LIQUORS—*Continued.*

ant, was held by the railroad as defendant's agent and with his consent and procurement. *Ibid.*

10. *Intoxicating Liquor—Search and Seizure—Constitutional Law.*—The "Search and Seizure Act" of 1913, making the possession of more than one gallon of spirituous liquor *prima facie* evidence of keeping it for sale in violation of law is constitutional and valid. *S. v. Randall*, 757.

11. *Intoxicating Liquor—Husband and Wife—Evidence.*—Where the husband is on trial for violating the prohibition law, it is competent for a third person to testify as to the conversation between the defendant and his wife, with statements by the latter tending to fix the former with the guilt of the offense charged. *Ibid.*

12. *Intoxicating Liquors — "Search and Seizure" — Constitutional Law.*— Chapter 44, Laws 1913, known as the Search and Seizure Law, is constitutional and valid. *S. v. Cathey*, 794.

INVITATION. See Common Carriers, 1.

ISSUES. See Bankruptcy, 2, 5; Bills and Notes, 2; Contracts, 1; Criminal Law, 5; Insurance, 17; Judgments, 11, 14; Trials, 1; Vendor and Purchaser, 2; Wills, 7.

1. *Issues—Insurance—Loan Note—Consideration.*—The forms of issues submitted to the jury are of little consequence if the material facts at issue are clearly presented by them; and where the controversy is whether an insurance company had the right to deduct the amount of a loan note from the amount of its matured policy before payment, for failure of a consideration for the note, an issue presenting the question of whether the note, in the stated amount, was given without consideration is amply sufficient. *Cowles v. Assurance Society*, 368.

2. *Issues — Contributory Negligence — Evidence — Telegraphs.*— Upon the delivery of a telegram to the agent of a telegraph company, properly addressed as to the sendee and town, the agent asked for a better address, and was told by the sender he could give the street address but not the number of the residence. There was conflicting evidence as to whether the sender said "East McBee Avenue at 111" or "East Avenue, 113." The sendee was a white man well known in the town, and the message was delivered to a negro by the same name, at a widely different number of house. The sender of the message afterwards offered in time to supply the correct and definite address, but the agent at the receiving point told him the message had been delivered: *Held*, it is the duty of a telegraph company to deliver a telegram with reasonable promptness when it is correctly addressed, and under the evidence in this case an issue as to contributory negligence was erroneously submitted to the jury. *Howard v. Tel. Co.*, 495.

3. *Issues—Condemnation—Special Benefits.*—In these proceedings to assess damages to the owner of lands for a right of way taken in condemnation proceedings, it is held that the issue submitted was sufficient to include any special benefits claimed by the defendant to inure to the lands, and the charge gave the defendant the full benefit thereof. *Land Co. v. Electric Co.*, 674.

JOINDER. See Removal of Causes, 7.

JUDGMENTS. See Removal of Causes, 4; Usury, 1; Wills, 6; Convicts; Criminal Law, 25; Appeal and Error, 1, 4, 12; Courts, 5; Deeds and Conveyances, 1, 3, 6, 8, 16; Drainage Districts, 2, 4, 5; Equity, 3; Escheat, 1, 2; Husband and Wife, 1; Intoxicating Liquors, 1, 2; Levy, 1, 2; Limitation of Actions, 4; Mortgages, 1.

1. *Judgments—Default and Inquiry—Corporations—Debts—Agreement of Shareholders—Individual Liability.*—A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of amount of damages open to the inquiry; and where an action is brought against a shareholder in a corporation for the payment of his ratable share due upon a corporate debt, which he, with the other shareholders, promised to pay in consideration of the creditors permitting the corporate merchandise to be sold in bulk, and the complaint alleges these facts, and a judgment by default is taken for the want of an answer, it is not open to the defendant to show that he had not participated in the meeting of the stockholders when the agreement was voted upon, and that he was not bound thereby. *Armstrong v. Asbury*, 160.

2. *Judgments—Courts—Records—Signature of Judge.*—The statutory requirements that a judgment be signed by the trial judge is merely directory and not mandatory, and when the record entries contain all the essential elements of a judgment it is not necessary to their validity as a judgment that they should have been signed by the judge. *Brown v. Harding*, 253.

3. *Judgments—Motions to Set Aside—Courts—Transcript of Judgment.*—Where the transcript of a judgment has been duly docketed in another county than the one in which it was obtained, a motion to set it aside should be made in the court in which it was originally obtained. *Ibid.*

4. *Judgments—Plaintiffs—Beneficial Owners — Payment.* — The presumption is that the plaintiff who has obtained a judgment is the owner thereof, with the burden of proof on one alleging to the contrary; and where the plaintiff has obtained two judgments, one in his own name and the other as trustee, he can enforce the latter judgment for the benefit of the true owner, and hold the proceeds for his use and benefit, and the judgment debtor will be protected by payment to the plaintiff of record. *Ibid.*

5. *Judgments — Transcript — Irregular Judgments — Motions — Collateral Attack.*—Objection for defect of parties must be taken by answer or demurrer, or it will be considered as waived, and the matter cannot be questioned collaterally when judgment has been obtained and transcript thereof docketed in another county, and the regularity of the proceedings is sought to be questioned in the latter county. *Ibid.*

6. *Judgments — Intervenors — Beneficial Owners — Payment — Parties — Power of Courts.*—In this action to enforce a judgment lien upon land in favor of the plaintiff therein, a stranger to the action intervened, claiming the beneficial interest or ownership of the judgment. Under the circumstances, it is *held*, that it may be expedient to determine the facts as to the beneficial interest to protect the plaintiff from mistake in paying out the funds when received by him; and that the court may make other parties who may have an interest in the judgment. *Ibid.*

JUDGMENTS—*Continued.*

7. *Judgments—Junior Judgments — Liens — Equity—Marshaling.*—Where a judgment creditor owns lands subject to a lien of another judgment, and sells a part thereof subject to his junior judgment, the rule of equity requiring the senior judgment debtor to resort first to the lands not embraced by the lien of the junior judgment creditor is subject to the further principle of equity that it must not be done if it involves the senior judgment creditor in litigation or danger of loss; and these rules apply to the purchaser of the remaining portion of the land later sold by the judgment debtor. *Ibid.*

8. *Same—Interests at Issue.*—Where a senior judgment creditor has a lien upon an entire tract of land of the judgment debtor and only a part thereof is subject to a lien of a junior judgment, but both are interested in the determination of facts involved in the further prosecution of the action, the further delay, with its incidental annoyance and expenses, does not call for the application of the equitable principle that the senior judgment creditor is not required to proceed first to collect his judgment out of the lands singly charged, when he would thereby be prejudiced, etc. *Ibid.*

9. *Same — Senior Judgment — Evidence of Payment.*—Where a lien by judgment is against the whole tract of land of a judgment creditor and only a part thereof is subject to the lien of a junior judgment creditor, and there is conflicting evidence as to whether the senior judgment has been paid in full, or extinguished by assignment, or whether other parties are therein interested by a partial assignment and who claim the lands under a deed subsequently made by the judgment debtor: *Held*, the right of the senior judgment creditor to enforce his lien by the sale of the entire tract should be first ascertained before he can enforce it. *Ibid.*

10. *Judgments—Estate—Assignments—Extinguishment.*—A lien by judgment on lands does not vest any estate in the judgment creditor, but only the right to have it sold and applied to the satisfaction of his debt, and a quitclaim deed made by him to a purchaser from the judgment debtor can only have the effect of extinguishing the lien thereon. *Ibid.*

11. *Same—Husband and Wife—Issues.*—In this case it appearing that the husband had assigned to himself a judgment constituting a lien on the land bought by the wife from the judgment creditor, and there is controversy as to whether the husband paid for the assignment of the judgment with his own or his wife's money, an issue as to that question is suggested for the determination of the jury. *Ibid.*

12. *Same—Release.*—Where the wife who has purchased lands subject to a lien of an outstanding judgment has been released therefrom, a purchase and assignment of the judgment by the husband for the benefit of the wife operates only as confirming the release to the wife, unless it was an independent transaction based upon an independent consideration. *Ibid.*

13. *Judgments—Motions to Vacate—Meritorious Defense.*—Where, on appeal from a judgment rendered in the lower court, it is held that the judgment is a nullity, it is unnecessary for the defendant to show that he has a good and meritorious cause of action for a new trial to be ordered. *Estes v. Rash*, 341.

JUDGMENTS—*Continued.*

14. *Judgments—Issues—Contributory Negligence.*—Where in an action to recover of a telegraph company damages for mental anguish the trial court has erroneously submitted an issue as to contributory negligence, which the jury found in the affirmative, but assessed the damages under the third issue, the Supreme Court will not set aside the erroneous issue and give a judgment for the damages assessed, for the finding as to contributory negligence tended to reduce the amount of damages in the consideration of the jury. *Howard v. Tel. Co.*, 495.

15. *Judgment—Excusable Neglect—Attorney and Client.*—A party litigant must give his case the attention that a man of ordinary prudence would give his important business affairs; and where a defendant has employed one of a firm of attorneys nonresident of the county wherein the case was pending, who had sole charge of his interest in the case, and soon after filing the answer this attorney died, of which the defendant had knowledge, and neglected to employ another attorney for seven months, and after an intervening term judgment was obtained against him, he may not have the judgment set aside for excusable neglect upon the ground that the deceased attorney had failed in his promise to employ local attorneys to represent him, and that he was not informed or did not know that the case had been set on the calendar for trial. *Queen v. Lumber Co.*, 501.

16. *Judgments—Nonsuit—Dismissal—Estoppel.*—Where a cause has not been tried upon its merits, but dismissed for failure of a party to restore a lost record required by order of the court, the judgment of the court can have no more legal effect than a judgment of nonsuit, and does not estop the party from maintaining a subsequent suit for the same cause of action. *Grimes v. Andrews*, 515.

17. *Judgments—Fraud.*—Where the parties have agreed to compromise an action, and the judgment entered is attacked for fraud or imposition in an independent action, as not being in conformity with the agreement entered into, it is immaterial that the alleged fraud was not repeated when the court signed the judgment, for it is considered as having continued from the date of its origin to the rendition of the judgment, and then operating upon the party, in the absence of allegation to the contrary. *Moody v. Wike*, 541.

18. *Same—Independent Action—Fraud on Court—Motions in the Cause.*—An independent action to set aside a judgment for fraud in its procurement is a proper remedy, and the judgment may be attacked by motion in the original cause when it has been obtained by fraud practiced upon the court. *Ibid.*

19. *Judgment — Default — Excusable Neglect — Limitation of Actions — Statutes.*—Where a judgment by default final has been taken for the want of an answer, and it appears that summons had been personally served, a verified complaint filed fully setting forth the facts entitling plaintiff to the judgment, the judgment being taken in the course and practice of the courts, is regular, and may not be set aside by motion for excusable neglect, etc., after one year from its rendition, the time limited controlling. Revisal, sec. 513. *Lee v. McCracken*, 575.

JUDICIAL KNOWLEDGE.

Judicial Knowledge—Railroads—Vortex—Passing Trains.—The plaintiff claims that he was drawn into the vortex of defendant's rapidly pass-

JUDICIAL KNOWLEDGE—*Continued.*

ing train, which caused the injury complained of. *Held*, the Court will take judicial knowledge of the fact that the force would be centrifugal from the side of the train, and would cause him to fall outward, instead of creating a vortex which would carry him beneath the train. *Davis v. R. R.*, 582.

JUDICIAL NOTICE. See Evidence, 24.

JUDICIAL SALES.

Judicial Sales—Sales—Confirmation — Exceptions — Court's Discretion — Appeal and Error.—In this case it appearing that an estate consisting originally of a large tract of land has been administered upon for fifty years, a part of the land having been sold from time to time until it consisted of undefined mineral interests, reserved in the former conveyances, and unlocated lands, and the trustee has been ordered by the court to sell this residue, in an action within the court's jurisdiction, in which all interested were parties, to which order no exception was taken, but exception was taken to an order of the court confirming the sale, wherein it was ascertained and adjudicated that the residue had been sold at the best possible price and the findings are supported by evidence: *Held*, the order appealed from, in such instances ordinarily addressed to the discretion of the trial court, will not be disturbed. *Henry v. Hilliard*, 578.

JURISDICTION. See Commerce, 2; Courts; Criminal Law, 10; Pleadings, 14.

JURORS. See Courts, 3; Homicide, 10.

JURY. See References, 5.

JURY.

Jury—Homicide—Criminal Law—Challenge for Cause.—Questions asked jurors by the solicitor on a trial for a capital felony for the purpose of ascertaining whether they belonged to the Society of Friends, who have conscientious objections to capital punishment, is not a challenge for cause, which the prisoner may admit and stand the juror aside. *S. v. Christy*, 772.

JUSTIFICATION. See Slander, 4.

KNOWLEDGE. See Bankruptcy, 4.

LACHES. See Pleadings, 12.

LANDLORD AND TENANT. See Criminal Law, 16.

Landlord and Tenant—Criminal Law—Ungathered Crops—Indictment—Interpretation of Statutes.—The Landlord and Tenant Act, Revisal, sec. 1993, vests the constructive possession of the crop in the landlord to protect his liens, and the actual possession in the tenant to subserve the interests of both in the cultivation and gathering of the crops, and under the construction of Revisal, sec. 3665, making it an indictable offense for the tenant to remove the crops under certain conditions, with sec. 3664, making it indictable for the landlord to unlawfully, etc., seize the crops when nothing is due him, it is *Held*, that the word "crops" includes those ungathered as well as gathered,

LANDLORD AND TENANT—*Continued.*

and an indictment for that the landlord seized the "corn growing and unmatured in the field," etc., charges an indictable offense, when it is otherwise sufficient. *S. v. Townsend*, 696.

LESSOR AND LESSEE. See Contracts, 7.

LEVY. See Executions, 1, 2, 3, 4; Statutes, 10.

1. *Levy—Conversion—Judgment Liens—Equity.*—Where lands are devised for life and by the terms of the will then to be sold and the proceeds distributed to designated persons, the interest of one of such persons may not be levied upon either as lands of personality, though under the terms of the devise the lands will be regarded as personalty when so sold, the remedy being by an action in the nature of a bill of equity, at the proper time, by which the lien of the judgment creditor may be preserved and protected. *Clifton v. Owens*, 607.

2. *Same—Devise—Lands—Personalty—Trusts and Trustees.*—A devise of lands for life to the widow, then with bequest to certain named of testator's children, "to have the said property, and the same to be sold and the money coming from said sale to be divided among" the testator's said children: *Held*, the intent of the testator as gathered from the terms of the will is controlling, and thereunder the devises named have only the naked title, to be held by them in trust until the lands shall be sold, and the proceeds, upon distribution, go directly to them as personalty, under the equitable doctrine of conversion. *Ibid.*

LIENS. See Contracts, 8; Deeds and Conveyances, 1; Equity, 4, 5, 6; Judgments, 7; Levy, 1, 2; Mechanics' Lien; Receivers, 1, 2.

Liens—Statutes—Cutting Logs—Appeal and Error—Costs.—The definition of laborers who are entitled to a lien for work while engaged in cutting logs into lumber, under the provisions of chapter 150, sec. 6, Laws 1913, as decided in *Glazener's case*, 167 N. C., 676, is further classified in this case; and the laborers being entitled to a lien upon their employers' interest in the lumber, it is held that the amounts due them be retained out of such interest and paid over to them. The plaintiffs, having established their lien, are entitled to recover cost of appeal. Revisal, 1279. *Hogsed v. Lumber Co.*, 529.

LIMITATION OF ACTIONS. See Deeds and Conveyances, 9; Evidence, 2; Insurance, 1; Judgments, 19; Master and Servant, 9; Municipal Corporations, 17, 19; New Trial; Pleadings, 12; Reference, 4; Usury, 3; Wills, 2, 3, 6.

1. *Limitation of Actions—Disability—Interpretation of Statutes.*—A person by reason of the disability mentioned in Revisal, sec. 362, does not lose his right to maintain his action within the time generally limited to the subject-matter thereof, but he may do so within three years from the removal of the disability, though it may extend the time generally limited to actions of that character. *Cooley v. Lee*, 18.

2. *Limitation of Actions—Heirs at Law—Wills—Devises—Interpretation of Statutes.*—Revisal, sec. 369, suspending the statute of limitations during controversy over the probate of a will "when no administrator is appointed" applies only to protect creditors, there being no one for them to sue. *Stelges v. Simmons*, 42.

LIMITATION OF ACTIONS.—*Continued.*

3. *Limitation of Actions—Reformation of Deeds—Discovery of Mistake.*—In this action, involving title to land, it is *Held*, under the plea of the statute of limitations, that the question was one of fact, that is, whether the defendant discovered the mistake in the deed more than three years prior to the institution of the action, and no error was found in the instruction by the trial judge upon the evidence introduced. *McKimmon v. Caulk*, 54.

4. *Limitation of Actions—Judgments—Interpretation of Statutes—Prospective Effect.*—Where the statute of limitations is pleaded against an execution under a judgment, and it appears that in computing the time it is necessary to cover a period since the operative effect of chapter 111, Laws 1905 (now Revisal, sec. 686), the express provision of the statute makes its effect prospective and not retrospective, and its bar may not successfully be relied upon. As to whether the sale of the homestead subjects it to the lien of a prior judgment, upon which execution has been issued, under the provisions of Revisal, sec. 686, *Quere. Farrar v. Harper*, 133 N. C., 71, cited and distinguished. *Brown v. Harding*, 253.

5. *Limitation of Actions—Contracts—Consideration for Services—Board—Wills—Devises—Implied Promise.*—In an action to recover for board and lodging furnished the deceased by the plaintiff, there was evidence tending to show that the deceased had rented to the husband of the plaintiff his home place, and visited and stayed with them at certain intervals and for certain periods of time, for which he promised to compensate the plaintiff by leaving her, at his death, the said home place; that the deceased had at one time executed a will to carry out this promise; that more than three years next before the commencement of this action the plaintiff and her husband, upon default of the deceased, moved away from this place, and that the testator died, leaving no provision in his will to carry out his promise: *Held*, a question arose under the evidence as to whether the plaintiff and the deceased mutually abandoned the contract when the plaintiff and her husband moved from the land; and if so, as a matter of law, her cause of action was barred by the statute; but if otherwise, she had the right to elect to wait until the death of the deceased and recover for the amount of her damages, as upon an implied promise to pay for the value of the services rendered. *McCurry v. Purgason*, 463.

6. *Same—Measure of Damages.*—Where the plaintiff is entitled to recover for board and lodging she had supplied a deceased person under his promise to leave her at his death a certain lot of land, which the deceased had failed to perform, and before his death had rendered performance by the plaintiff of her part of the agreement impossible, the measure of damages is the value of the land to be devised less the cost and expense she would have incurred in performing her part of the contract, when she has elected to wait until the death of the deceased and sue for the full damages arising from his breach of the contract. *Ibid.*

7. *Limitation of Actions — Fraud — Discovery — Statutes.*—Applying Revisal, sec. 395, subsec. 9, to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, the provision that "the cause of action is not deemed to have accrued until the discovery by the aggrieved of the facts constituting the

LIMITATION OF ACTIONS—*Continued.*

fraud," by correct interpretation is held to mean until the impeaching facts should have been discovered in the exercise of reasonable business prudence. *Ewbank v. Lyman*, 505.

8. *Same—Constructive Notice.*—While the mere registration of deed to lands from a husband to his wife will not usually be imputed for constructive knowledge that it was done in fraud of the husband's creditors, it may be otherwise regarded when taken in connection with other relevant circumstances, as where the deed has been registered for eleven years in the proper county before the institution of the action; that the plaintiff had foreclosed her mortgage securing her demand, but with partial results; the defendant had renewed his obligation to her several times, being unable to pay it; that there were numerous encumbrances on his property, and that she had visited the county for the purpose of investigation and had full opportunity of ascertaining the facts, all of which occurred a long time prior to the three-year period prescribed by Revisal, sec. 395, subsec. 9; and under the circumstances of this case it is held that the failure of the plaintiff in not sooner investigating the records was such negligence as will be imputed to her for knowledge, and bar her cause of action. *Ibid.*

9. *Limitation of Actions—Nonresidents—Statutes.*—Revisal, sec. 396, refers to the absence of the debtor from the State, and the statute of limitations does not apply to him for the reason that he is not within the jurisdiction of the court and its process. Therefore a nonresident creditor who seeks to set aside a deed of his debtor for fraud is not excused by his absence for not complying with the provisions of Revisal, sec. 395, subsec. 9, requiring that he must bring his action within three years from the discovery of the fraud. *Ibid.*

10. *Limitations of Actions—Nonsuit—New Actions.*—Revisal, sec. 370, requiring that a new action shall be brought within a year after nonsuit or dismissal, applies only when the party would otherwise be barred from his right of action from the lapse of time prescribed by the statute of limitations relating to the cause of action. *Grimes v. Andrews*, 515.

11. *Limitations of Actions—Possession of Lands.*—The statute of limitations will not run in favor of a purchaser of lands at a judicial sale who brings his action to recover the lands from the defendant who has continuously been in possession and who seeks to engraft a parol trust on the plaintiff's title in his favor. *Ibid.*

12. *Limitation of Actions—Dower—Heirs at Law.*—The possession of the widow of her dower interest in her deceased husband's lands is but an elongation of his estate, and is not adverse to his heirs, but in privity with them; and the statute of limitations will not begin to run adverse to them until her death. *Graves v. Causey*, 175.

LIS PENDENS. See Injunction, 4.

LIVE STOCK. See Carriers of Goods, 1; Commerce, 1, 3.

MALICE. See False Imprisonment, 3; Homicide, 3, 4.

MALICIOUS PROSECUTION. See Conversion; False Imprisonment, 1, 2.

1. *Malicious Prosecution—Termination of Criminal Action—Evidence.*—Where the prosecutor, under an indictment charging that the de-

MALICIOUS PROSECUTION—*Continued.*

fendant obtained his horse by false pretense, withdraws the warrant from the justice of the peace before the time set for the trial, but after it had been returned and served, and burns it, it is sufficient evidence that the prosecution had been terminated, in an action for slander brought by the defendant against the prosecutor. *Hadley v. Tinnin*, 84.

2. *Malicious Prosecution—Arrest—Evidence—Trials.*—Where in an action for malicious prosecution there is evidence tending to show that a warrant for plaintiff's arrest had been sworn out by the defendant, the prosecutor in the criminal action; that the officer serving the warrant read it to the plaintiff and told him he could see the justice of the peace issuing the warrant, about arranging the bond, which was not required under an agreement that plaintiff would attend the trial, which was not had because the defendant theretofore terminated the prosecution: *Held*, some evidence of the fact of plaintiff's arrest, and involved the questions whether that was the intention of the officer serving the warrant or whether the plaintiff understood he was under compulsion to attend the trial. *Ibid.*

MANDAMUS. See School Districts, 1.

1. *Mandamus—County Auditor—County Commissioners—Alternate Mandamus.*—A peremptory *mandamus* will not issue to the auditor of Wake County to compel him to approve and countersign an account for an indebtedness arising under contract made by the county commissioners in a sum certain and passed upon and approved by them, without first referring the claim to him for auditing and reporting to the board; and, in this case, an alternate writ is directed, requiring him to countersign the claim or show cause why he has not done so, giving him time to examine witnesses under the statutory authority given him, if he so desires; and, should he continue to refuse, it is within the power of the commissioners to order him to do so, that the treasurer may pay the claim. *Wilson v. Holding*, 352.

2. *Same—Appeal and Error—Costs.*—The costs on appeal in this case are taxed equally between the parties, it being decided that an alternative writ be ordered to issue in the lower court, to the county auditor of Wake, to audit and countersign an account ordered by the county commissioners to be paid, and that the relief of a peremptory *mandamus* was properly refused. *Ibid.*

MAPS. See Deeds and Conveyances, 22.

MARRIAGE. See Divorce.

MARRIED WOMEN. See Mechanics' Liens, 1, 2.

1. *Married Women—Separate Realty—Constitutional Law—Deeds and Conveyances—Privy Examination—Contracts to Convey—Statutes.*—Before the enactment of the Martin act, being ch. 109, Laws 1911, our statutes defining the status of married women in reference to their capacity to make an executory contract, notably Revisal, secs. 952, 2094, 2107, 2112, and 2113, were upheld as valid with reference to the provisions of our Constitution, Art. X, sec. 6, that "the real 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

MARRIED WOMEN—*Continued.*

way entitled, shall be and remain the sole and separate estate and property and such female . . . and, with the written assent of her husband, conveyed by her as if she were unmarried"; but were not construed so as to permit a married woman, without the privy examination taken, to make executory contracts which would be a charge upon her separate real estate. *Warren v. Dail*, 406.

2. *Same—Damages.*—Chapter 109, Laws of 1911, known as the Martin act, permitting a married woman to contract with reference to her separate property or estate as if she were a *feme sole*, is constitutional and valid, and by express terms excepts only from its provisions conveyances "of her realty unless made with the written assent of her husband as provided by sec. 6 of Art. X of the Constitution," and requires that her privy examination as to the execution of the same be taken as now required by law. The statute having expressly reserved "conveyances" of a married woman of her realty from its effect, the exception is not held to apply to her contracts to convey her realty, and where such examination has not been obtained in such contracts, and she refuses to perform them for that reason, equity cannot enforce specific performance, but damages may be awarded against her in an action at law for the breach of the contract, which, under our Code practice, are administered in one court. *Ibid.*

3. *Married Women—Contracts to Convey—Separate Realty—Deeds and Conveyances — Privy Examination — Equitable Owner.*—The Martin act being construed to permit a married woman to contract with regard to her separate property as if she were a *feme sole*, except as to her conveyances of her realty, in which case her privy examination, etc., is required, the equitable principle which regards the holder of an interest in lands as the real owner cannot defeat the legislative intent by making the reservation apply to her contracts to convey her realty also. *Ibid.*

4. *Same—Damages—Statutes.*—The prohibition of the Martin act that a married woman may not convey her separate real property except upon her privy examination being duly taken, does not prevent the application of the usual rule of contracts, that, upon their breach, damages are recoverable, so as to deny a recovery of damages where a married woman has contracted to convey land, without her privy examination taken, and fails in her performance thereof, specific performance being regarded as additional and supplementary to the rule for damages. *Ibid.*

5. *Same—Consent of Husband—Husband and Wife.*—The rule that a married woman is liable in damages for failure to specifically perform her contract to convey her lands under the Martin act may not be successfully defeated upon the ground that she may be unable to get the consent of her husband to the conveyance, in the absence of any bad faith. *Ibid.*

6. *Married Women—Separate Realty—Contracts to Convey—Impossible Performances — Damages — Equity Jurisdiction — Code Practice — Statutes.*—The rule that where an executory contract incapable of specific performance is entered into by the complaining party with knowledge of the fact, damages for its breach are not recoverable, was addressed to a suit brought in equity where legal damages were

MARRIED WOMEN—*Continued.*

not administered, and to the jurisdiction of the court therein, and has no application under our Code procedure where legal and equitable remedies are administered in the same court. *Ibid.*

MARSHALING. See Judgments, 7.

MASTER AND SERVANT. See Pleadings, 2, 3; Railroads, 1.

1. *Master and Servant—Orders of Master—Negligence—Trials—Evidence—Insufficient Help—Questions for Jury.*—In an action against a foundry company to recover damages for a personal injury, when there is evidence that the plaintiff, an inexperienced helper, informed the head molder that the help he had for lifting a box weighing two thousand pounds was insufficient, and was told, in reply, to "Go ahead; the help is sufficient," and in consequence thereof the box fell upon the plaintiff and injured him when thus being lifted, and there is further evidence that, in fact, the help was insufficient, it raises a question as to the actionable negligence of the defendant therein to be determined by the jury. *Brown v. Foundry Co.*, 38.
2. *Master and Servant—Coemployees—Contributory Negligence—Trials—Evidence—Nonsuit.*—In an action to recover damages for a personal injury caused by the defendant's negligence in not providing sufficient help in lifting a two-thousand-pound box, and there is evidence to sustain the allegation, the burden of proof is on the defendant to show, when relied upon as a defense, that the injury was due to the plaintiff's contributory negligence, or that of his colaborers; and where the defendant fails to introduce his evidence thereof, a judgment as of non-suit should not be entered, the evidence introduced being viewed in the light most favorable to the plaintiff. *Ibid.*
3. *Master and Servant—Safe Appliances—Negligence—Trials—Evidence—Proper Appliances—Instructions.*—Where there is evidence tending to show that the injury complained of, in an action to recover damages for personal injury, was caused by the negligence of the defendant in failing to furnish sufficient help to raise a box weighing two thousand pounds, the exclusion of testimony by the trial judge, that a crane accessible at the time was a proper way to handle the box, and his expression that the defendant was not required to keep up with the inventive genius of Edison or George Westinghouse, etc., constitute reversible error. *Ibid.*
4. *Master and Servant—Proper Tools—Defects—Ordinary Care—Simple Tools—Negligence.*—The master is required by the exercise of proper care to furnish the servant with suitable tools and appliances, to be used by him in the performance of his work, which he cannot delegate to another and avoid liability for an injury proximately resulting from a defect which should reasonably have been observed; and this principle applies not only to instances of complicated machinery, but to simple tools, when it is properly applied. *Klunk v. Granite Co.*, 70.
5. *Same — Negligence — Proximate Cause—Trials—Evidence—Nonsuit.*—In an action to recover damages of a master for his failure to supply the servant with proper tools with which the latter performed his services, there was evidence in plaintiff's behalf tending to show that

MASTER AND SERVANT—*Continued.*

the servant was required to cut stone with a steel tool called a pitching tool, made by another employee of the defendant from steel bars of inferior grade after they had been used in defendant's machine, and more likely to burst, owing to its inferiority, when stricken a heavy blow, and that in cutting the stone it was necessary for the servant to place the edge or bit part upon the stone and strike the other end heavy blows with a hammer; the pitching tool burst, causing a splinter of steel to fly off and injure his eye; that the master's attention had previously been called to the inferiority of the steel from which the pitching tools were made; that the tool had been worn to a length of four inches from an original and ordinary length of six or seven inches; that the defective steel was observable while being made into the tool, but not in its use: *Held*, sufficient for the determination of the jury upon the question of defendant's actionable negligence, proximate cause, and the master's exercise of reasonable care in not discovering the defect. *Ibid.*

6. *Master and Servant—Federal Employers' Liability Act—Exclusive Provisions—State Court — Jurisdiction — Courts.*—The Federal Employers' Liability Act supersedes and is exclusive of the State statutes upon the same subject-matter. *Renn v. R. R.*, 128.

7. *Master and Servant—Federal Employers' Liability Act—Pleadings—Amendments—State Courts.*—An amendment to the complaint in an action brought in the State court under the provisions of the Federal Employers' Liability Act so as to allege a cause of action thereunder, presents a matter of pleading and practice which the Federal courts will not review. *Ibid.*

8. *Master and Servant—Pleadings—Amendments—Federal Employers' Liability Act—State Courts—Concurrent Jurisdiction—Statutes.*—Where an action has been brought in the Federal court under the provisions of the Federal Employers' Liability Act, allegations material to the case may be inserted by amendment in conformity with our statute (Revisal, sec. 507), and as our State courts are given concurrent jurisdiction with the Federal courts by the Federal statutes, the State court is given like power to permit amendments when the action has been commenced therein. *Ibid.*

9. *Master and Servant—Federal Employers' Liability Act—Pleadings—Amendments—Limitation of Actions.*—Where an action has been brought in the State court under the provisions of the Federal Employers' Liability Act, and an amendment to the complaint has been properly allowed to bring the cause within the terms of the Federal statute, the amendment relates back to the time of the commencement of the action, and the statutory provision that the action must be brought in two years has no application when the action itself has been commenced in the required period. *Ibid.*

10. *Master and Servant — Negligence — Duty of Master — Safe Place to Work—Trials—Evidence—Questions for Jury.*—In an action to recover damages for a personal injury to an employee caused by the negligence of the defendant railroad company, where there is evidence tending to show that the plaintiff, whose duty it was to repair pumps along the defendant's line of interstate railway, was injured, while in the course of his employment, at night, by falling upon ice formed upon the usual path from the pumping house, caused by the

MASTER AND SERVANT—*Continued.*

negligent overflow of the defendant's water tank, in freezing weather, which should have been removed by the defendant's employees, engaged in this character of work at the place during the preceding day; that at the time the plaintiff was carefully walking along this path behind the one who had been operating the pump and who carried a lighted lantern to show them the way; that the ice had become covered with snow which concealed it; that the plaintiff was not informed thereof by the other employee of the defendant; that it was unusual for the defendant to permit this condition at the place: *Held*, sufficient upon the issue of defendant's actionable negligence in failing to provide a safe place for the plaintiff to go while in the performance of the work required of him. *Ibid.*

11. *Master and Servant—Negligence—Assumption of Risks—Instructions—Trials.*—Where an employee of a railroad company sues for damages for a personal injury received by falling upon ice negligently left at a place where he was required to go at night in the course of his employment, and there was evidence tending to show negligence therein on the part of the defendant and proper care by the plaintiff while walking there; that the snow covered and concealed the ice, of which the plaintiff was neither aware nor informed, the occurrence being at night and by lantern light: *Held*, a charge of the court was correct that the plaintiff assumed the risks which inclement weather added to his employment, and if the injury complained of resulted solely from that source he could not recover; but if the ice there was caused by the negligence of the defendant in overflowing the water tank in freezing weather and the plaintiff was unaware of the fact, and could not have known thereof by the exercise of ordinary care under the circumstances, then he would not be held to have assumed the risks in walking upon the path at the time of the injury. *Ibid.*

12. *Master and Servant—Duty of Master—Safe Place to Work—Negligence—Trials—Evidence.*—In this action to recover damages for a personal injury, there was evidence tending to show that plaintiff, an employee of a railroad company, was engaged, under the order and direction of the defendant's foreman, in placing iron bars into a rack containing eight bins, one above the other, the topmost being 10 feet above the ground; that the plaintiff was required to shove the bars into the bin as they were handed to him by others, while standing on a plank, used as a scaffold, 12 feet long, 12 inches wide and 2 inches thick, one end resting 6 feet above the ground and the other on a pile of iron 2 or 2½ feet high; that while in this position and acting under the foreman's orders the plank in some way broke or fell, causing the injury complained of: *Held*, evidence sufficient upon the issue of defendant's actionable negligence in failing to provide the plaintiff a reasonably safe place to do the work required of him. *Smith v. R. R.*, 184.

13. *Master and Servant — Employer — Pleadings — Defective Appliances—Approved and in General Use—Other Negligent Acts—Trials—Questions for Jury.*—Where an employee of a furniture manufacturing company sues for damages, alleging that the defendant negligently failed to provide for the "belt sander" or power-driven polishing machine, at which he was required to work, an iron cleat, one edge of which was finished with teeth something like a saw, which was known, approved, and in general use, and that instead thereof provided

MASTER AND SERVANT—*Continued.*

for the machine a thin strip of wood or timber, nailed to the top of the table of the machine, which was weak, flimsy, and insufficient, and not adapted to the use to which it was being put, and that the boards to be dressed or polished by the plaintiff were warped and twisted, thereby increasing plaintiff's danger, and in consequence of this failure of defendant to perform his duty, etc., the injury complained of was caused: *Held*, the negligence alleged consisted not only in the failure of the master to furnish a device known, approved, and in general use, but that it negligently furnished an improper or defective device, rendered more unsafe by the warped and twisted boards and the lack of proof by the plaintiff that the device alleged was known, approved, and in general use left the further question of defendant's negligence in furnishing the defective appliance and improper boards, when there is conflicting evidence, to the determination of the jury. *Deligny v. Furniture Co.*, 189.

14. *Master and Servant — Employer — Pleadings—Negligence—Allegations of Separate Acts—Appeal and Error.*—Where, in an action to recover damages for an injury alleged to have been negligently inflicted by several acts of the defendant, each is sufficient in itself to sustain a verdict in plaintiff's favor, the elimination of one or more of them will not deprive the plaintiff of his judgment when one or more of the alleged causes of action have been legally and properly established. *Ibid.*

15. *Master and Servant — Contributory Negligence — Trials — Evidence — Questions for Jury.*—Upon the question of whether a servant is guilty of contributory negligence in continuing to work at a power-driven machine in the face of an added danger due to the master's negligent failure to inspect the machine or correct the defect after he had been informed thereof, etc., it is competent for the jury to consider the relative positions of the parties, and the circumstances that the servant is dependent upon his wages for a living, etc.; and the right of action of the servant will not be barred by the doctrines of assumption of risk or contributory negligence in continuing to work under the existing conditions, unless the danger was so obvious and threatening, or the chances of danger were so much greater than those of safety, that a man of ordinary prudence would not have continued to work there. *Ibid.*

16. *Same—Instructions—Construed as a Whole—Error in Part—Appeal and Error.*—When contributory negligence and assumption of risk are relied on in an action to recover damages for personal injury, and the evidence is conflicting on the issues, the questions are for the determination of the jury under correct application of the principles of law to the facts by the charge of the court; and where the charge of the court, construed as a whole, is clearly and unmistakably and correctly expressed, so that the jury could not have been misled, fragments thereof, taken separately, though subject to criticism, will not be held reversible error. *Ibid.*

17. *Master and Servant—Negligence—Defective Appliance—Evidence of Former Defect.*—Where the damages sought in an action to recover for a personal injury are alleged to have been caused by a defective machine furnished by a master to the servant at which the latter performed his services, and there is evidence thereof, it is competent

MASTER AND SERVANT—*Continued.*

for the plaintiff to testify that the machine had been working badly before then by reason of the defect alleged, especially when there is evidence that the plaintiff had theretofore reported the defect and the defendant had promised to correct it. *Ibid.*

18. *Trials—Improper Questions—Appeal and Error—Unanswered Questions—Impeachment—Procedure.*—An improper question asked a witness on the trial of an action, for the purpose of impeaching his testimony, will not be considered on appeal unless it is in some way made properly to appear what the answer would have been, or that it was prejudicial to the appellant. In such instances the complaining party should immediately appeal to the trial judge for his intervention to correct the abuse, in his sound discretion, from which there is no appeal unless in very exceptional cases. *Ibid.*

19. *Master and Servant—Instructions—Safe Place to Work—Evidence—Jury—Presumptive Knowledge.*—Where damages are sought in an action for the negligent caving in of a ditch 8 feet deep by 2½ feet wide, in which the plaintiff, defendant's employee, was at work at the time, by reason of not having left bulkheads to protect the plaintiff, testimony that a shallow ditch would not require bulkheads or bracing, but if deep enough to reach a man's head in rotten ground or liable to cave it would require them for safety, does not constitute reversible error as an expression of opinion, for men of ordinary intelligence are presumed to know this without testimony thereof. *Jenkins v. Long*, 269.

20. *Master and Servant—Negligence—Safe Place to Work—Evidence—Notice of Danger.*—Where negligence alleged in an action for damages is the failure of the defendant to have provided bulkheads or braces in a ditch where his employee, the plaintiff, was required to work, and in consequence the ditch caved in and injured him, testimony of a witness that he told the defendant's superintendent in charge of the work on the day of the injury, but before its occurrence, that the ditch was dangerous without the bulkheads, is competent as fixing the defendant with previous knowledge of the existing danger. *Ibid.*

21. *Master and Servant—Negligence—Safe Place to Work—Instructions—Appeal and Error—Harmless Error.*—Where an employer is sued for his negligence in failing to provide his employee a safe place to work in digging a ditch, the alleged negligence being the failure to have bulkheads in the ditch to prevent the falling in of the dirt that caused the injury complained of, a charge of the court that it was the duty of the employer "to see that the place is kept safe," while erroneous, is held as harmless error when, interpreting the relevant portions of the charge in connection therewith, it appears that he charged the jury that it was the employer's duty to provide a reasonably safe place to work and to exercise reasonable care to see that the place was kept safe, etc. *Ibid.*

MATTERS AT ISSUE. See Appeal and Error, 9.

MECHANICS' LIENS.

1. *Mechanics Liens—Married Women—Executory Contracts—Interpretation of Statutes—Liens.*—By chapter 106, Laws of 1911, known as the Martin Act, a married woman may enter into an executory contract

MECHANICS' LIENS—*Continued.*

affecting her real and personal property, except with her husband, as if she were unmarried, and where she and her husband held the title to lands by entireties and they contract for materials used in a building thereon, those furnishing the material may acquire a lien on the property by complying with the provisions of the statute, Revisal, sec. 2016; ch. 617, Laws 1901. *Finch v. Cecil*, 72.

2. *Lien for Material—Estate by Entireties—Statutes.*—When material for building is furnished to husband and wife jointly, to be used on realty held by entireties, the lien given by Rev., 2016, attaches. *Ibid.*

3. *Mechanics' Liens — Materials Furnished — Defendant's Consent — Instructions—Liens.*—In this action to enforce a lien for material furnished in the construction of the defendant's house, the affirmative answer by the jury on the first issue, as to the indebtedness of the plaintiff and the amount, is held controlling upon the question of a lien therefor, the evidence being conflicting, and the judge having instructed the jury to answer the issue in the negative if the defendant had not consented to the purchase of the materials. *Morrow v. Starr*, 671.

MOOT CASE. See Appeal and Error, 22.

MORTGAGES. See Costs, 2; Deeds and Conveyances, 7, 8, 14, 15; Drainage Districts, 1, 2, 3, 4, 5; Injunction, 4; Receivers, 1, 2.

1. *Mortgages — Sales — Balance Due — Payment Into Court — Tender of Judgment—Injunction—Deeds and Conveyances.*—A sale under a power thereof contained in a mortgage securing four notes maturing at different times will be restrained in an action brought by the mortgagor for that purpose when it appears that the plaintiff has paid into the court for the defendant a small balance due on the first and only note matured at the time, and has tendered a judgment for the costs. *Frink v. Tyre*, 41.

2. *Mortgages—Sales—Adverse Possession—Deeds and Conveyances—Color of Title.*—The possession of lands by a mortgagor is not adverse to the mortgagee, and he may not claim under his deed as color of title; and where he continues in possession after foreclosure sale it must be of sufficient character for twenty years to ripen the title in him by adverse possession. *Grimes v. Andrews*, 515.

3. *Mortgages—Sales—Possession—Equity — Constructive Notice.* — Where the mortgagor of lands remains in possession after foreclosure sale, and seeks to engraft a parol trust in his favor on the title of the vendee of the purchaser at the sale, his continued possession is evidence of constructive notice to the vendee of the equity he claims. *Ibid.*

4. *Mortgages—Foreclosure—Suits — Parties — Mortgagee — Purchaser at Sale.*—Where there are several mortgages on land which are foreclosed by suit, and bought by the junior encumbrancer, and all of the mortgagees are parties to the suit, the purchaser acquires a good title, unless he has purchased with notice of an enforcible outstanding equity. As to whether the junior mortgagor would acquire title if he were not a party to the suit, *quere*. *Ibid.*

5. *Mortgages — Foreclosure — Suits — Equity — Notice — Purchasers for Value—Issues.*—The vendee of the purchaser of lands sold by order

MORTGAGES—*Continued.*

of court in a suit to foreclose several mortgages thereon brought his action against the mortgagor in possession, who sets up the equity that the purchaser, a junior encumbrancer, had become so under a certain agreement to hold the lands in trust for him. Under the circumstances of this case the Court suggests two issues: (1) "Was the plaintiff a purchaser for value?" (2) "Did she have notice of the equity alleged to have arisen out of the agreement of the mortgagor and the purchaser at the sale?" *Ibid.*

MOTIONS. See Evidence, 11, 14, 28; Judgments, 3, 5, 13, 15, 18, 19; Process, 1; Removal of Causes, 1; Indictment 1, 2, 5; Trials, 6.

MOTIONS TO QUASH. See Criminal Law, 8, 10.

MUNICIPAL CORPORATIONS. See Elections, 1, 2; Evidence, 26; Injunction; Trials, 4.

1. *Municipal Corporations—Cities and Towns—Sidewalks—Paving—Assessments—Legislative Powers—Constitutional Law.*—It is within the power of the Legislature to confer upon an incorporated town the authority to require property owners along the streets to improve the sidewalks in front of their property, in such manner as the commissioners of the town may direct, and, on failure to do so after ten days' notice by the chief of police, to cause the work to be done either with brick, stone, or gravel, or other material, in the discretion of the commissioners, and assess the cost against the property-owner, add the same to his taxes, and collect it as other taxes are collected. *Marion v. Pilot Mountain*, 118.

2. *Same — Ordinances — Estoppel — Injunction.*—Where an incorporated town has passed an ordinance under statutory powers conferred on it, requiring the property owners to pave the sidewalks along their lots with certain materials, and if not done after ten days' notice, the town would have the work done and assess the property and collect the amount with other taxes from the owner of the lot, and it appearing in a suit of a delinquent owner of a lot to restrain the collection of the assessment, that he had been given eighteen months notice before the town had the paving done, was present at the time thereof, making suggestions as to how it should be done, and took no step in opposition until the bringing of his suit, but theretofore promised to pay the assessment, it is *Held*, not only is the assessment a valid one under the statute and ordinance, but that the plaintiff, by his acts and conduct, is estopped to deny its validity. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Pavings—Assessments—Payment into Court—Statutes—Injunctions.*—Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Revisal, sec. 2855. *Ibid.*

4. *Municipal Corporations—Streets and Sidewalks—Discretionary Powers—Cities and Towns.*—Streets are public highways in cities for travel by the public, and adjacent owners have no more rights in them

MUNICIPAL CORPORATIONS—*Continued.*

than the public generally, except the right of ingress, egress, light and air and lateral support, it being within the discretionary power of the proper municipal authority to determine where and how the streets shall be improved, what part is required for travel of vehicles, and what part, if any, shall be divided off as a pavement for the sole use of pedestrians; and the courts can interfere with the exercise of this discretion only in case of fraud and oppression, constituting manifest abuse thereof. *Crotts v. Winston-Salem*, 24.

5. *Same—Pedestrians—Adjoining Owner—Rights of Owner—Damages.*—The owner of a city lot surrounded by three streets and formed by them into a triangle sixty by sixty-seven and sixty-eight feet, brings action against the city for a mandamus to provide sidewalks around his lot, sidewalks across the street therefrom having been made by the city authorities. The municipal authorities had deliberated upon the matter and concluded that the public necessity and convenience did not require the sidewalks contended for by plaintiff, and that such would make the streets too narrow and cause congestion of traffic therein; that the sidewalks across the street were sufficient, and to use those proposed, pedestrians would have to cross over the street for the purpose: *Held*, the exercise of the discretionary authority of the municipal authorities in refusing to establish the sidewalks contended for is not reviewable by the courts, and no damages are recoverable in the action. *Ibid.*

6. *Municipal Corporations — Paving—Assessments—Legislative Authority —Vote of People—Constitutional Law—Statutes—Cities and Towns.*—A municipal corporation may assess the owners of property along the street for paving the street, under legislative authority, without submitting the question to a vote of the town. Upon the question of notice, estoppel, and injunction, see *Marion v. Pilot Mountain*, *post*, 118. *Lewis v. Pilot Mountain*, 109.

7. *Municipal Corporations — Franchises — Public Utilities — Street Railways.*—A city or town may grant a charter under the general provisions of Revisal, sec. 2916 (6), to a corporation to build a street railway along certain of its streets for the purpose of transporting passengers and freight, upon reasonable terms, the words "public utilities" including within their meaning enterprises of this character. *Turner v. Public-Service Co.*, 172.

8. *Municipal Corporations — Cities and Towns — Streets — Bridges — Approaches — Overflow of Water — Negligence — Trials — Questions for Jury.*—Where a city has built approaches to a bridge over a stream on its street with embankments on one side tending to increase the water in its flow under the bridge, which otherwise would have been too much, and had left a depression on the approach on the other side across which the water would flow in rainstorms of such character as were reasonably expected to occur, and which would not have been likely had the approaches on both sides been graded the same and to the same level, and which had partially been done by the city authorities, but left incompleted: *Held*, evidence of actionable negligence of the city upon evidence tending to show that, upon the plaintiff's intestate coming from school and attempting a second time to cross, she was swept from her feet by waters rushing across this depression caused by an overflow of the stream from a rainstorm of not unusual occurrence, and drowned. *Bell v. Greensboro*, 179.

MUNICIPAL CORPORATIONS—*Continued.*

9. *Municipal Corporations — Discretionary Powers — Grading Streets — Railroads—Constitutional Law—Damages.*—The rule excluding liability of a municipality to an abutting property owner for damages caused to his property by the grading of a street done within the exercise of its discretionary powers. has no application where the work is done by a railroad company to facilitate its own business, for, though authorized by the city, the railroad company, in so acting, appropriates the property of the private owner and is liable to him to the extent that the value of the property has been diminished thereby, as well as for damages caused by its negligent and unskillful construction. *Bennett v. R. R.*, 389.

10. *Same—Delegated Powers.*—The right conferred upon a municipality to grade its streets without liability to abutting owners, within the proper exercise of its discretionary power, is for the public benefit, and cannot be transferred to a railroad company to do so for the furtherance of its own business. *Ibid.*

11. *Municipal Corporations—Grading Streets—Railroads—Measure of Damages—Issues.*—It appearing in this case that a railroad company was appropriating private property to its own use in grading a street of a city for its own purposes, it is held that one issue submitted as to the damages was sufficient, and that permanent damages were recoverable by the abutting owners. *Ibid.*

12. *Municipal Corporations—Streets—Abutting Owners—Railroads—Street Railways—Additional Servitude.*—A street railway, under the usual acceptance of the term that such is a railway which takes on and discharges passengers at its various local stops, generally at the corners of streets in the town or city in which it operates, is regarded as facilitating rather than interfering with local traffic, and, as such, does not impose an additional servitude on the streets for which compensation may be had by the abutting owner. *Kirkpatrick v. Traction Co.*, 477.

13. *Same—Equipment—Incidents—Motive Power.*—The operation of an ordinary steam railroad on the streets of a town or city imposes an additional burden to use the street for the purposes of the municipality, and where a railway, though operated by electricity, engages in hauling freight over its lines in trains of several freight cars, baggage and mail cars, etc., such as used by a steam railroad, with the incidental noises and inconveniences attending the operation of the ordinary steam railroads, with which it connects and exchanges traffic, it is regarded as an ordinary carrier of goods operating by steam, and requires that compensation be made to the abutting owner on the street for its additional servitude. *Ibid.*

14. *Municipal Corporations — Streets — Railroads — Damages—Statutes—Common Law.*—Where a statute authorizes the operation of a steam railroad along the streets of a city without providing for damages to the abutting owner for the additional servitude of the streets, the remedy for such compensation exists at common law. *Ibid.*

15. *Municipal Corporations — Streets — Additional Servitude — Abutting Owner—Proprietary Interests—Damages.*—It is not necessary that the abutting owner on a street should have the fee-simple title, subject to the city's easement, for him to recover damages for additional servitude thereon imposed by the operation of a steam railroad, for

MUNICIPAL CORPORATIONS—*Continued.*

he has such proprietary interest in the street as will prevent its use for other than the public purposes of a street. *Ibid.*

16. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligence—Constructive Knowledge.*—In an action against a city and another for damages for a personal injury there was evidence tending to show that the codefendant, a plumbing company, under a permit of the city to make sewer connections for an owner adjoining the street, left an excavation 2 to 2½ feet deep across a much frequented sidewalk, unlighted and without guard, into which plaintiff, while going along the sidewalk on 31 December, about 6:30 or 7 p.m., fell and was injured: *Held*, sufficient upon the question of the defendant city's actionable negligence in failing to have the place properly lighted or safeguarded; and also, under the circumstances, to give the city ample constructive and previous knowledge of the existence of the defect. *Seagraves v. Winston*, 618.

17. *Municipal Corporations—Cities and Towns—Limitation of Actions—Statutes.*—Prior to the enactment of chapter 224, Laws 1891, title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under our statutes, Revisal, secs. 375 and 381, as construed by the decisions of our Supreme Court, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. *Threadgill v. Wadesboro*, 641.

18. *Same—Courts' Decisions.*—Where an owner has acquired title by adverse possession to a part of a street under The Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereafter by this Court cannot disturb the title theretofore acquired. *Ibid.*

19. *Municipal Corporations—Cities and Towns—Streets—Limitation of Actions—Appeal and Error.*—Where one claims title to a part of a city street by adverse possession, and the city has pleaded the statute of limitations, and it has properly been ascertained and adjudicated by the trial court that the *locus in quo* was not a part of the city's street, it is *Held*, that the question whether such right by adverse possession could be acquired against a municipality becomes immaterial. *Ibid.*

20. *Municipal Corporations—Ordinances—Sunday Closing—Unlawful Discrimination—Test—Procedure—Constitutional Law.*—Commissioners of a town may, by valid ordinance, prohibit the opening of places of business in the town on Sunday, excepting drug stores, Revisal, sec. 2923; and where by further provision of the ordinance the drug stores may sell drinks, tobacco, etc., between certain hours an objection to this provision on the constitutional ground of unlawful discrimination can only be tested by indicting the drug stores selling the soft drinks between the hours prescribed, and not by alleging it as a defense to an indictment that other stores have violated the ordinance. *S. v. Medlin*, 682.

21. *Municipal Corporations—Statutes—Ordinances—Sunday Closing—Unreasonable Regulation—Drug Stores—Other Commodities—Constitu-*

MUNICIPAL CORPORATIONS—*Continued.*

tional Law.—An ordinance of a town may, under the provisions of the Revisal, sec. 2923, prohibit the opening of all places of business on Sunday, except drug stores; and it is not an unreasonable regulation, under the police power of the town, inasmuch as drug stores are open all day Sunday, for the governing authorities to further provide that they may sell articles of common use which are *quasi* necessities to many, such as mineral waters, soft drinks, cigars and tobacco only, between certain hours of that day. *Ibid.*

22. *Municipal Corporations—Ordinances—Sunday Closing—Interpretation of Statutes.*—Revisal, sec. 2836, forbidding "work in ordinary callings on Sunday," under a penalty of $1, does not make keeping open shop and selling goods on Sunday an indictable offense, and an ordinance of a town, passed in pursuance of Revisal, sec. 2923, for the better government of the town, prohibiting keeping open stores and other places of business on Sunday for the purpose of buying and selling, excepting ice, drugs and medicines, and permitting drug stores to sell soft drinks, etc., within certain hours, is not objectionable on the ground that the offense is covered by Revisal, sec. 2836, for the ordinance is passed under the police powers of the town, its violation is indictable, and in furtherance of local government, which the statute contemplates. *Ibid.*

23. *Municipal Corporations—Ordinances—Valid in Part—Constitutional Law.*—A town ordinance which is valid in part as a police regulation, regarding Sunday hours, will not be held invalid because of a further and unconstitutional provision or exception from its general terms. *Ibid.*

MUNICIPAL COURTS. See Criminal Law, 6.

MURDER. See Homicide.

NEGLIGENCE. See Appeal and Error, 14; Carriers of Goods, 9; Carriers of Passengers, 1, 2; Common Carriers, 2; Master and Servant, 1, 3, 5, 12, 13, 14, 20, 21; Electricity; Evidence, 11, 13; Municipal Corporations, 8, 16; Pleadings, 4; Railroads, 1, 7, 10, 11, 16; Telegraphs; Trials, 4.

1. *Negligence—Evidence—Railroads—Defective Locomotives—Other Locomotives.*—Evidence introduced on the trial of the action should only be admitted when it has a reasonable tendency to throw light on the matters in dispute; and where the plaintiff sues to recover damages of a defendant railroad company alleged to have been caused by a spark from a defective locomotive, and the evidence is conflicting as to whether a spark from this particular engine could have been thrown the necessary distance at the time of the conflagration or under the conditions then existing, evidence tending only to show that another of the defendant's locomotives, at a subsequent time, had thrown sparks the necessary distance while passing the place is incompetent. *Kerner v. R. R.*, 94.

2. *Negligence—Runaway Horse—Trials—Evidence—Questions for Jury.*—In an action to recover damages for a personal injury alleged to have been caused to the plaintiff by a runaway horse, there was evidence tending to show that the defendant tied his spirited horse, four years of age, knowing its habits and disposition, to a dead limb of a tree, in an open space in a populous business portion of the town, in full

NEGLIGENCE—*Continued.*

view of a street, and left him there all day without food and attention; and that about 3 o'clock in the afternoon, after the horse had several times shown restlessness and tried to break away, he broke off the dead limb and ran away through the cleared space to the street and upon the plaintiff, causing the injury alleged: *Held*, the previous knowledge of the defendant as to the disposition of the horse, and the external appearance of the limb, or the impression made upon him at the time as to its reliability, are but details of the evidence, which taken together in its several aspects was sufficient to carry the case to the jury, under the application of the rule of the prudent man. The question as to whether it was necessary for the defendant to have had previous knowledge of the disposition of the horse, discussed by WALKER, J. *Lloyd v. Bowen*, 217.

3. *Same—Requested Instructions—Appeal and Error.*—Where damages for a personal injury are sought in an action upon the alleged negligence of the defendant in tying his spirited four-year-old horse in an open space in a populous portion of the city, to a dead limb of a tree and leaving him there all day, a requested instruction making the defendant's liability depend upon his previous knowledge and the appearance of the limb to which he tied him is too restricted in its scope, and objectionable as confining the answer of the jury to matters relating to only one phase of the case, when there are several upon which the defendant's actionable negligence may be founded. *Ibid.*

4. *Negligence — Runaway Horse — Trials — Instructions.*—Where the negligence alleged in an action to recover damages for a personal injury inflicted by a runaway horse, with evidence to support it, is that the defendant tied his young and restless horse to a dead limb of a tree in a populous portion of the city, and left him there, an instruction to the jury is proper that to constitute negligence it was not required that the defendant should have been able to foresee that by his conduct the injury would result to the plaintiff exactly as it did, but if he reasonably could have foreseen that injury would result to someone, it was sufficient. *Drum v. Miller*, 135 N. C., 204, cited and applied. *Ibid.*

5. *Negligence—Instructions—Proximate Cause.*—Where the charge of the court to the jury is excepted to on the ground that it did not define the doctrine of proximate cause in a proper case, or that he improperly left out this element to the appellant's prejudice, the charge will be construed as a whole, and no reversible error will be found when it appears in several parts of his charge that he instructed them that they must not only find that there was negligence on the defendant's part, but that it must have caused the injury, and that the jury could not have been misled by the charge. *Ibid.*

6. *Negligence—Proximate Cause.*—Negligence to be actionable must be the proximate cause of the injury for which damages are sought. *Paul v. R. R.*, 230.

7. *Same—Trials—Evidence—Questions for Jury.*—Ordinarily the question of proximate cause of an injury arises from the evidence as an issue of fact for the jury under proper instructions, and not solely as a matter of law. *Ibid.*

NEGLIGENCE—*Continued.*

8. *Same—Continuing Cause—Independent Cause—Concurring Cause.*—Where a railroad company has blocked a crossing of the street of a town in violation of an ordinance, and, in consequence, one driving a mule has driven to another crossing, and there his mule became frightened by steam escaping from a locomotive on the track of the same company and causing injury, in his action to recover damages therefor it is held that the escaping steam, while in itself affording no evidence of negligence, concurred with the continuing negligence of the defendant in blocking the street, but not as an independent or intervening cause; and that the conditions being within the knowledge of the defendant, the negligent act was the proximate cause of the injury, being that without which it would not have occurred; and that under the evidence of this case an issue as to defendant's actionable negligence was properly submitted to the jury. *Ibid.*

9. *Torts—Tort-Feasors—Anticipated Consequences.*—The rule holding the tort-feasor liable for his act does not require that the particular injury complained of must be foreseen or anticipated by him, but that some injury may follow the wrongful act. *Ibid.*

10. *Negligence—Contributory Negligence—Railroads—Crossings—Trials—Evidence—Questions for Jury.*—In an action to recover damages for a personal injury inflicted by a passing train of defendant railroad company, as the plaintiff was crossing the defendant's track on foot, there was evidence tending to show, and *per contra*, that the place was a much-used public crossing; that the train was moving from the east at an unusual and improper speed and without giving signals or other proper warnings; that the plaintiff had stopped, looked and listened before entering upon the track; that towards the east there was a pile of cross-ties extending 75 feet from the track, and a traction engine obstructing the view, and while the plaintiff was looking for a train which was expected from the west, the train from the east ran upon him unexpectedly, and as he heard the wheels of the approaching train he sprang to escape from the track, but his foot caught, causing him to make two or three hard jerks before he could free himself, preventing him from doing so in time: *Held*, the case was properly left to the determination of the jury upon the issue of contributory negligence. *Penninger v. R. R.*, 473.

11. *Negligence—Evidence—Proximate Cause—Trials—Questions for Jury.* Proximate cause of an injury will not be determined as a matter of law when more than one inference can be drawn from the evidence; for then it is a question of fact for the determination of the jury. *Hopkins v. R. R.*, 485.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 3, 5.

NEW TRIAL. See Appeal and Error, 14.

New Trial—Limitation of Actions—Appeal and Error.—A new trial for error committed will not be granted on appeal unless it will serve a good purpose; and when it appears that the statute of limitations has been properly pleaded and from the admitted facts the cause of action is therein barred it will not be granted on plaintiff's behalf. *Ewbanks v. Lyman*, 505.

NOL. PROS. See Homicide, 17.

NONRESIDENT. See Limitation of Actions, 9; Usury, 3.

NONSUIT. See Appeal and Error, 3, 6; Carriers of Goods, 7; Evidence, 22; Judgments, 16; Limitation of Actions, 10; Master and Servant, 2, 5; Railroads, 17.

NOTES. See Insurance, 5, 6, 9; Trials, 2.

NOTICE. See Mortgages, 3, 5.

NUISANCE. See Deeds and Conveyances, 23; Criminal Law, 13.

1. *Nuisance—Permanent Damages—Test.*—Upon the question of whether a plaintiff is permitted at his election to recover the entire damages to his lands, past, present, and prospective, in one action, for nuisances and wrongs of like character, the test is whether the whole injury results from the original wrongful act or the wrongful continuance of the state of facts produced by these acts; that is, whether the wrongful act is single and entire, though causing subsequent and continuous injury, or whether a defendant wrongfully continues and maintains the conditions which result in continued or recurring damages. *Webb v. Chemical Co.*, 662.
2. *Nuisance—Public Rights—Permanent Damages—Private Owner.*—Permanent damages to the land arising from the commission of a nuisance or wrongs of like character are allowable where the rights of the defendant, whose acts cause the nuisance, are modified by the presence of a superior interest arising to the public, as in instances of *quasi*-public corporations having right of eminent domain; but not where the alleged injury arose from the acts of a private owner. *Ibid.*
3. *Same — Fertilizer Plant — Private Owner — Successive Actions.*—The manufacture of fertilizers is not a nuisance *per se*, and whether it is such depends upon its situation, environment, and the manner in which it is being operated; and when there is nothing to show that such manufacture is objectionable as a public nuisance, the action is strictly one in adjustment of private rights, and the plaintiff is confined in his suit to a recovery of damages in successive actions, the same to be estimated up to the time of the trial, if the nuisance continues. *Ibid.*
4. *Nuisance—Private Owner—Abatement.*—Where it appears in an action for damages for the maintenance of a nuisance that it is one in adjustment of private rights and not one in which permanent damages may be awarded, the court may, if the facts and circumstances justify it, order an abatement. *Ibid.*

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 8, 20, 23, 25, 33; Evidence, 28; Trials, 6.

OPINION. See Evidence, 9, 11, 14.

ORDINANCES. See Municipal Corporations, 2, 20, 21, 22, 23.

PAROL. See Contracts, 2, 3.

PAROL GUARANTY. See Contracts, 4.

PARTIES. See Appeal and Error, 6, 18; Corporation Commission, 1; Drainage Districts, 1, 7; Equity, 7; Judgments, 6; Removal of Causes, 7.

1. *Parties—Demurrer—Answer—Waiver—Appeal and Error—Pleadings.* Upon the filing of an answer to a complaint the right to demur on the ground that the defendants are not sufficiently designated is waived, and where in this state of the pleadings the action is decided against the defendants in a court of a justice of the peace, who appeal to the Superior Court, it is reversible error in the latter court to sustain the demurrer. *Rosenbacher v. Martin*, 236.
2. *Parties—Pleadings—Process—Amendments — Court's Discretion — Interpretation of Statutes.*—Amendments to pleadings are liberally allowed in the discretion of the courts, in order that substantial justice may be done between the parties, except when the effect of the amendment is to allege, substantially, a new cause of action; and where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the Superior Court to allow the plaintiff to correct the mistake, both in the process and pleadings. Revisal, secs. 495, 507, 509, 510. *Ibid.*
3. *Parties—Minors—Representation—Trusts and Trustees—Courts—Investments.*—Where investments made by a trustee under orders of court are objected to because of minor interests alleged not to have been properly represented by guardian before the court the investments objected to will not be set aside as a matter of right unless it is made to appear that they had been improper in themselves or worked injury to the estate, or that the orders of the court were improvidently made. *Fisher v. Fisher*, 379.

PARTITION. See Husband and Wife, 1.

PARTNERSHIP. See Bankruptcy, 3.

PAVING. See Injunction; Municipal Corporations.

PEDESTRIAN. See Carriers of Passengers, 2; Municipal Corporations, 5.

PENALTY. See Carriers of Goods, 4, 5, 6.

PENALTY STATUTES. See Commerce, 6; Public Officers.

PERMISSIVE USER. See Deeds and Conveyances, 19.

PLEADINGS. See Appeal and Error, 3; Contracts, 12; Divorce, 1; Injunction, 4; Insurance, 9; Master and Servant, 7, 8, 9, 13, 14; Parties, 1, 2; Removal of Causes, 7; Statutes, 2.

1. *Pleadings—Proof—Variance—Interpretation of Statutes.*—A variance between the pleadings and proof will not be regarded as material unless it misleads the complaining party to his prejudice in maintaining his action upon its merits (Revisal, sec. 495); and where the complaint is objected to on the ground that it does not state a cause of action, the objection will not be sustained if, as appearing therefrom, the facts alleged are sufficient for that purpose, when liberally construed, however inartificially the complaint may have been drawn. *Renn v. R. R.*, 128.
2. *Same—Master and Servant—Federal Employers' Liability Act.*—Where the plaintiff, an employee, is injured by a railroad company while engaged in interstate commerce, and therefore has no cause of action

PLEADINGS—*Continued.*

except under the Federal Employers' Liability Act, and in his complaint alleges that the defendant negligently caused the injury by failing to provide him a safe place to do the work required of him, for which he asks damages; that the defendant was operating an interstate railroad, without reference to intrastate business; that he was an employee of the defendant and injured in the discharge of his duties as such: *Held*, allegations sufficient to bring the cause of action alleged within the Federal statute and for the plaintiff to maintain his action thereunder. *Ibid.*

3. *Pleadings—Amendments—Master and Servant—Federal Employers' Liability Act—Statutes.*—Our statute permits pleadings to be amended as of course, without cost or prejudice to the proceedings already had at any time before the period for answer expires, or thereafter, unless it is for the purpose of delay beyond the term for trial (Revisal, sec. 505), or within the discretion of the trial judge, on such terms as he may deem proper, among other things, "by inserting other allegations material to the cause" (Revisal, sec. 507); and where the cause of action falls within the Federal Employers' Liability Act and is brought in the State court, an amendment may be allowed there alleging it to have been brought under the provisions of that act, where, as in this case, the original complaint, with the amendment, states a good cause of action thereunder. *Ibid.*

4. *Pleadings—Negligence—Allegations Sufficient.*—Where an employee alleges negligence, in his action to recover damages against his employer, in his failing to furnish him a safe place to work, in that he negligently permitted ice, in freezing weather, to be upon a pathway he was required to go in the performance of his duties, and there is evidence tending to show that the defendant's water tank at this place was negligently pumped to overflowing and the freezing of this overflow water caused the ice complained of to form: *Held*, the evidence that the tank ran over was competent without being specially alleged, for the purpose of showing that the ice did not form from natural causes. *Ibid.*

5. *Pleadings — Amendments — Court's Discretion — Commencement of Action.*—An amendment to a complaint is allowable in the reasonable discretion of the trial judge unless its effect is to add a new cause of action or change the subject-matter thereof, and an objection cannot successfully be urged on these grounds where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated; and when properly allowed, it shall have reference by relation to the original institution of the suit. Revisal, sec, 507 *et seq.* *Lefler v. Lane*, 181.

6. *Same—Subcontractors—Railroads—Contracts—Correction — Equity.*—Where the written contract with a subcontractor prevents the plaintiff from showing that he was entitled to recover for clearing a railroad right of way the full acreage between two points thereon, and not for only such parts as he had actually cleared, it is within the discretion of the trial judge to allow him in his action to amend his complaint by alleging that a stipulation of the contract, permitting such recovery, was omitted from the written contract by the mutual mistake of the parties. *Ibid.*

PLEADINGS—*Continued.*

7. *Pleadings—Amendments—Court's Discretion—Appeal and Error—Interpretation of Statutes.*—An amendment to the complaint is necessary for the plaintiff, in an action to recover damages for the negligence of the defendant, when his evidence does not correspond with the facts alleged by him; and where a new cause of action is not alleged by the amendment, the court may allow it in its discretion upon such condition as will protect the other party against being taken by surprise, or direct the facts to be found according to the evidence, if the variance is not material (Revisal, secs. 515, 516), or if the variance is material, and the adverse party has been taken by surprise or misled, the court may allow the amendments upon such terms as may be just. Revisal, sec. 515. *Deligny v. Furniture Co.*, 189.

8. *Same—Supreme Court.*—In proper instances the Supreme Court will allow an amendment to the complaint, for the furtherance of justice. Revisal, sec. 1545. *Ibid.*

9. *Pleadings — Answers — Admissions — Interveners — Bills and Notes — Fraud—Due Course—Trials—Directing Verdict.*—Where the defendant is sued for damages for fraudulently and falsely representing the grade of cotton sold and delivered to the plaintiff, for which the latter had given his acceptance, and an intervener in the action claims as a holder of the paper in due course, it is reversible error for the court to admit the defendant's answer in evidence, which admits that the plaintiff is a *bona fide* holder of the draft in due course, without notice of the infirmity in the instrument, when the controversy is solely between the plaintiff and the intervener; and the statements in the answer being of no more effect than the defendant's *ex parte* affidavit, it is proper for the trial judge to direct a verdict for the plaintiff, if the evidence is found by them as a fact, in the absence of other evidence. *Latham v. Rogers*, 239.

10. *Pleadings—Speaking Demurrers.*—A demurrer which denies the allegations of the complaint raises issues of fact and partakes of the nature of a speaking demurrer, which will not be sustained. *Gold Mining Co. v. Lumber Co.*, 273.

11. *Same—Parties—Appearance—Publication.*—When it is alleged in the complaint that the necessary parties are unknown to the plaintiff, but that service by publication has been made on all who have not appeared and made themselves such, it is sufficient, and a demurrer on the ground that it appears therefrom that sufficient parties to the suit have not been made will be overruled. *Ibid.*

12. *Pleadings—Demurrer—Limitation of Actions—Laches.*—The plea of the bar of the statute of limitations, raised in this case by demurrer to the complaint, cannot be entertained; nor will the question of laches, as there are no facts established upon which the Supreme Court can pass intelligently. *Ibid.*

13. *Pleadings—Demurrer—Speaking Demurrer.*—A demurrer to the complaint pleading the statute of limitations as a defense calls in aid matters extraneous to the pleading demurred to, and is called a "speaking demurrer," which is bad and not allowable. Revisal, sec. 361. *Moody v. Wike*, 541.

14. *Pleadings — Judgments — Fraud — Allegations Sufficient—Demurrer.*—The plaintiff in his action to set aside a judgment alleged that he

PLEADINGS—*Continued.*

and the defendant agreed upon a compromise judgment to be entered by consent, wherein the defendant was to receive about two acres of the land in controversy; that during his sickness he directed that the judgment be drawn to carry out the agreement, he being represented by his attorney, who was ignorant of the terms, and that upon representations of the defendant made to his own and the plaintiff's attorney, and with intent to deceive and to defraud the plaintiff, he deliberately and falsely caused other boundaries to be incorporated in the judgment, which included a much larger acreage: *Held*, these allegations, if sustained, were sufficient to set aside the judgments consequently entered for fraud; and upon demurrer they are taken to be true. *Ibid.*

PLEAS. See Criminal Law, 1, 2, 3, 4, 5; Reference, 4; Slander, 4; Venue, 1; Criminal Law, 17.

POLICE POWERS. See Intoxicating Liquors, 4; Constitutional Law, 3; Commerce, 5.

POSSESSION. See Deeds and Conveyances, 19; Estates, 2, 3; Evidence, 2, 19; Executions, 1, 2; Insurance, 9; Limitations of Actions, 11; Mortgages, 2, 3; Wills, 3; Intoxicating Liquors, 7, 8.

PREFERENCE. See Bankruptcy, 2, 3, 4.

PRESENTMENT. See Bills and Notes, 4.

PRESUMPTION. See Bills and Notes, 3; Carriers of Goods, 3; Commerce, 1; Grants; Homicide, 3; Insurance, 9; Master and Servant, 11; Railroads, 14, 15; Wills, 18.

PRIMA FACIE CASE. See Bills and Notes, 6.

PRINCIPAL AND AGENT. See Banks and Banking, 1; Carriers of Goods, 5; Contracts, 8; False Imprisonment, 1, 2; Insurance, 17; Telegraphs, 2; Vendor and Purchaser, 7.

1. *Principal and Agent—Insurance—Acceptance of Premiums—Ratification—Trials—Evidence—Questions for Jury.*—Where the question of authority of one to bind his principal, an insurance company, by accepting premiums from policyholders, is in controversy, and there is evidence that this money was remitted to and accepted with the knowledge of the company's general manager, authorized to bind the company by the transaction, and his testimony is conflicting but sufficient upon the question of establishing the local agency, it is for the jury to determine which part of his testimony is true, and it may find the fact of agency therefrom. *Morgan v. Fraternal Assn.*, 75.

2. *Principal and Agent—Railroads—Right of Way—Agency—Ratification.* When a railroad company accepts a deed from the owner of land for a right of way across it, procured by one who had assumed to act without its authority, its acceptance of the benefits thereof amounts to a ratification of the agency of the one so acting, to the same extent as if the act had theretofore been directly authorized, and it is held responsible for the representations made in its behalf in procuring the conveyance. *Starnes v. R. R.*, 222.

PRINCIPAL AND AGENT—*Continued.*

3. *Principal and Agent—Evidence—Declarations—Res Gestæ.*—The relevant declarations of one acting for a railroad company in procuring a right of way for the company from the owner of lands are competent evidence as a part of the *res gestæ* in the owner's suit to set aside the conveyance for fraud in its procurement. *Ibid.*

4. *Principal and Agent — Known Restrictions.*—While a contract within the apparent scope of an agent's powers may ordinarily be enforced against the principal, this position is not allowed to prevail where the contract is in violation of express restrictions on the agent's authority, and these restrictions are known to the party dealing with him; for in such case the latter may not insist on the validity of such a contract as against the principal. *Robinson v. B. of L. F. and E.*, 545.

5. *Same—False Representations—Estoppel — Insurance — Fraternal Orders.*—Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in the constitution and by-laws of the company, and there is evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the company is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that the agent of the company also knew that the applicant's statements were false. *Ibid.*

PRINCIPAL AND SURETY. See Conversion, 1; Usury, 1.

PRIVY EXAMINATION. See Estates, 5.

PROBATE. See Deeds and Conveyances, 27; Wills, 6, 20.

PROCESS. See Criminal Law, 6, 8; Parties, 2.

Process—Want of Service—Judgments—Motions—Appeal and Error.—A motion to set aside a judgment rendered in the court of a justice of the peace, made before that court, for failure of service of summons, is proper; and where the magistrate has found as a fact that there had been proper service of the summons, which is confirmed in that respect on appeal to the Superior Court, but the judgment is set aside on another and jurisdictional ground, the appeal involves only the question of the proper service of the summons, and, on appeal to the Supreme Court, the Superior Court judgment will be set aside and leave in force the magistrate's judgment. *Estes v. Rash*, 341.

PROMISE TO PAY. See Attorney and Client, 1.

PROXIMATE CAUSE. See Negligence, 5, 6, 7, 8, 11; Railroads, 5, 11, 16.

PUBLICATION. See Pleadings, 11.

PUBLIC LANDS.

1. *Public Lands—State Lands—Entries—Swamps—Separate Tracts—Interpretation of Statutes.*—Where an action of trespass upon lands, involving title, is made to depend upon the validity of entry and grant of swamp lands by the State to the defendant under the provisions of Revisal, sec. 1693, that the same is not subject to entry if in one marsh or swamp exceeding 2,000 acres, with certain excep-

PUBLIC LANDS—*Continued.*

tions not material to the case, and of sec. 1694, that marsh or swamp lands, if in a tract not exceeding 2,000 acres, is subject to entry, making void, by sec. 1699, all entries not authorized by ch. 37; and the fact is established by agreement of the parties that the defendant's entry was on Big Cypress, which was within the number of acres subject to entry unless included within Seven Creeks Swamp, and that the former entered into the latter at an angle of 90 degrees, running up some four miles, beginning in a narrow stream, two or three hundred yards wide where it empties, but narrower there than it is several hundred yards further up: *Held*, as a matter of law that Big Cypress is a separate tract of marsh or swamp land from Seven Creeks, and the exceptions of the statute not applying, the defendant's entry is a valid one, though it appears that sometimes during freshets and high water these swamps are all covered with one sheet of water. *Beer v. Lumber Co.*, 337.

2. *State Lands — Swamps — Definition — Interpretation of Statutes.*— Swamp lands, within the meaning of our statutes, are those too wet for cultivation except by drainage. Revisal, secs. 1693, 1694, 1699. *Ibid.*

3. *Public Lands—State's Lands — Seal — Signature—Evidence.*—For the original grant from the State to furnish evidence that it was signed by the Governor and countersigned by the Secretary of State, it must conform to the constitutional mandate that "The Great Seal of the State" be thereto affixed; and where a paper-writing purporting to be a grant of lands from the State is without the seal, and there is no recital of a seal in the paper, and no evidence that the seal has been affixed, it is inadmissible as evidence in the chain of title by a party claiming the lands. *Howell v. Hurley*, 798.

PUBLIC OFFICERS.

1. *Public Officers—Detaining Funds — Penalties — Interpretation of Statutes.*—In an action to recover the 12 per cent allowed under Revisal, sec. 284, from the clerk of the court, etc., for money unlawfully detained, it is necessary that the plaintiff show some adequate default; and it appearing in this case that the parties agreed to a settlement, but that the plaintiff had refused to make a proper allowance for certain expenditures, the cause is sent back for further findings as to what had been done by the parties at the attempted settlement, the amount, if any, in defendant's hands and due the plaintiff, or whether a proper tender had been made and refused. *Hannah v. Hyatt*, 634.

2. *Public Officers — Sheriffs — Salaries and Fees — Legislative Control.*— One who accepts a public office does so, with well defined exceptions as to certain constitutional offices, under the authority of the Legislature to change the emoluments he is to receive for the performance of his duties, at any time, and, while the office of sheriff is a constitutional one, the regulation of his fees is within the control of the Legislature, and the same may be reduced during the term of the incumbent, or he may therein be compensated by a salary instead of on a fee basis. *Mills v. Deaton*, 386.

3. *Same—"Back Taxes"—Interpretation of Statutes.*—Where the Legislature has enacted that, after a certain date, a sheriff of a county shall be compensated with a salary in lieu of all commissions, and

PUBLIC OFFICERS—*Continued.*

not, as theretofore, by fees, specifically providing that all fees, commissions, etc., on taxes collected, etc., "now belonging to or appertaining to, or hereafter by law belonging or appertaining to the sheriff by virtue of his office, shall faithfully be collected by him and turned over to the treasurer of the county," and back taxes are collected by the sheriff after the date whereon he was to be compensated by a fixed salary, it is *held*, that it was the intent and meaning of the statute that the salary should be for the full performance by the sheriff of his duties as such, and that he is required to pay all commissions for the collection of the back taxes to the county treasurer for the benefit of the county. This interpretation is emphasized by another section of the act construed, which indicates that the county commissioners were to have control over the collection of back taxes. *Ibid.*

PUBLIC POLICY. See Intoxicating Liquors; Roads and Highways.

PUBLIC ROADS.

1. *Public Roads — Taking of Soil — Interpretation of Statutes.*—Sec. 11, ch. 581, Laws of 1899, confers power only to enter upon uncultivated lands for the purpose of procuring soil to use in the construction of public roads, and entry upon cultivated lands for that purpose is without authority of law. *Combs v. Comrs.*, 87.

2. *Same—Uncultivated Lands.*—Lands are cultivated within the meaning of section 11, ch. 581, Laws of 1899, the soil of which may not be taken for use on the public roads, when at the time the soil therefrom is proposed to be taken they are covered with stubble from the crops harvested therefrom, and which have been in cultivation for a term of years and intended by the owner for continued cultivation; and the fact that at the time in question they were not under immediate cultivation does not affect the matter. *Ibid.*

3. *Same — Equity — Injunction.*—While equity will not restrain a mere trespass if due compensation can be awarded for the injury, it will do so, in proper instances, where it is continuous in its nature, or if it will destroy or seriously impair the property and prevent its enjoyment as it has been used. Hence, when the owner of lands has been cultivating them, and by unlawfully taking the topsoil thereof, for use on public roads it will destroy the value of the lands for the making of the crops, equity will enjoin the continuance of the unlawful act. *Ibid.*

PURCHASER FOR VALUE. See Bankruptcy, 1; Sales; Mortgages.

QUESTIONS FOR JURY. See Attorney and Client, 1; Commerce; Common Carriers, 2; Deeds and Conveyances, 6, 12, 28, 29; Electricity, 1; False Imprisonment, 2; Homicide, 2; Insurance, 2, 10; Master and Servant, 10, 13; Municipal Corporations, 8; Negligence, 2, 3, 7, 10, 11; Principal and Agent, 1; Railroads, 2, 4, 5, 17; Slander, 1, 2, 3; Telegraphs, 1, 2, 3; Wills, 5, 10, 18; Criminal Laws, 16; Homicide, 26, 30.

Trials — Evidence — Questions for Jury.—The question of whether the plaintiff has met the legal requirement of showing by strong, clear and convincing proof that the deed he seeks to correct was, in fact, intended for a mortgage, is one exclusively for the jury, it being

QUESTIONS FOR JURY—*Continued.*

within the province of the court only to lay down the rule of law applicable. *Ray v. Patterson*, 226.

RAILROADS. See Carriers of Goods; Carriers of Passengers; Condemnation, 1; Contracts, 7; Deeds and Conveyances, 12, 13; Easements, 6; Evidence, 18, 24; Instructions, 4, 5; Judicial Knowledge, 1; Municipal Corporations, 9, 11; Negligence, 1, 10; Principal and Agent, 2; Trials, 5.

1. *Railroads—Master and Servant—Safe Place to Work—Pedestrians—Defect in Crossties.*—Where the roadbed of a railway company is in good condition for the operation of its trains it does not ordinarily owe a duty to its employees to see that the crossties are sufficiently sound for their safety in walking along the track in the performance of their duties; and it is held in this case that it was not responsible in damages to its civil engineer for an injury received by him while locating a sidetrack, by reason of a rotten place in a sill giving way under his weight, causing his foot to slip down about five or six inches to the ballast of the road, resulting in his injury; for such an accident is not attributable to the negligence of the master in failing to provide his servant a safe place to work, or to the want of exercising ordinary care in anticipation of such result. *Nelson v. R. R.*, 170.
2. *Railroads—Escaping Steam—Frightening Horses — Negligence — Evidence—Trials—Questions for Jury.*—In an action to recover damages of a railroad company for an injury inflicted by reason of the plaintiff's mule becoming frightened by the defendant's locomotive, evidence tending to show that the mule became frightened at the steam arising from the locomotive in starting it, that the steam complained of was usual, in such instances, and not caused willfully or wantonly, is not sufficient to take the case to the jury upon the question of defendant's negligence. *Paul v. R. R.*, 230.
3. *Railroads—Pedestrians—"Stop, Look and Listen"—Contributory Negligence—Negligence.*—The principle that it is the duty of a traveler, whether on foot or otherwise, to stop, look and listen for approaching trains before entering upon a railroad crossing, and that his failure to do so is negligence which will bar his recovery for injuries received from passing trains, if it is the proximate cause thereof or of resulting death, is not always an absolute one, and may be qualified by attending circumstances. *Davidson v. R. R.*, 281.
4. *Same—Special Conditions—Trials — Evidence — Questions for Jury.*—Where an injury resulting in death is received by a pedestrian who has failed to look and listen before entering upon a railroad track at a public crossing, attributable to his having been struck by a passing train, and there is evidence tending to show that the track in question was a spur—crossing the street from the main line; that the track was covered from the effect of travel on the street, except the rails, and only one line of these showed above the level of the ground, and that only slightly; that the intestate, a stranger, was killed by a train from the main line running suddenly upon the spur track at an unusual time of day, without any warning of its approach and without proper lookout to give notice thereof: *Held*, the question of the intestate's contributory negligence in failing to stop, look and listen before entering upon the railroad should be submitted to the jury, and such will not bar plaintiff's action as a matter of law. *Ibid.*

RAILROADS—*Continued.*

5. *Railroads—Negligence—Contributory Negligence — Proximate Cause — Questions for Jury.*—Where a railroad company in connection with a lumber company has a spur track entering into the lumber company's yard, and there is evidence, in an action to recover damages for a personal injury, that, in leaving cars within the yard, the defendant left open spaces between them to enable the employees of the lumber company to pass and repass between them in going about their work, and that the plaintiff, such employee so engaged, before going between these cars, looked and listened as well as he could amid the customary noises of such places, and, thus assured of his safety, went between two of these cars and was caught and injured by reason of the defendant's train of cars coming into the yard, which occurred at irregular intervals, without warning or signal, and backing into one of them, and without proper lookout on the train or in the yard to warn him, it is held that, upon conflicting evidence, the issues of negligence, contributory negligence, and proximate cause were for the determination of the jury. *LeGwin v. R. R.*, 359.

6. *Railroads — Contributory Negligence — Safe Place — Precautions.* — Where it is shown that a railroad company left open spaces between cars placed in a lumber yard for the employees of the lumber company to pass in going about their work, and the plaintiff, such employee so engaged, was injured by the negligence of the defendant's employees in backing upon such cars, contributory negligence in bar of the plaintiff's right of action is not established by showing that had he gone from 60 to 70 feet around the cars he could have crossed in safety. *Ibid.*

7. *Railroads—Public Crossings — Automobiles — Vehicles — Negligence—Repairing Tracks—Trials—Evidence—Questions of Law.*—The plaintiff was injured while crossing in an automobile the defendant's railroad crossing, much used, and seeks to recover damages upon the ground that had the crossing been in a proper condition the automobile would not have been impeded, and so would have avoided being struck by a passing train, which caused the injury. The evidence showed that defendant's employees had been repairing a bad condition of the track at this place for two or three days, had raised the track, replaced some crossties, and had filled in with cinders, which had been packed in place by defendant's employees and by passing vehicles for the time stated; and, by an experienced witness, that cinders were best for this purpose. A witness for plaintiff testified that certain other material would have been better, but acknowledged that he was inexperienced in this class of work, and was not speaking with knowledge: *Held*, the evidence was not sufficient to take the case to the jury upon the question of any negligent breach of defendant's duty in reference to the condition of the crossing, either as to the material or the manner in which it was applied. *Hunt v. R. R.*, 442.

8. *Railroads—Crossings—Contributory Negligence — Stopping — Reasonable Precautions.*—It is not always required that a driver of a vehicle, before endeavoring to cross a railroad track at a public crossing, should come to a stop; and where he has been struck and injured by a passing train, and it is established that he looked and listened with a proper regard to his own safety, his having attempted to cross

RAILROADS—*Continued.*

without coming to a full stop will not, of itself, constitute such contributory negligence as will bar his right to recover damages in his action therefor. *Ibid.*

9. *Railroads—Automobiles—Vehicles — Occupants — Negligence Imputed.* Negligence on the part of the driver of an automobile will not be imputed to another occupant or passenger therein, unless such other occupant is the owner or has some kind of control over the driver; and this principle is applied in this case, where the chauffeur attempted to cross a railroad track at a public crossing, resulting in injury to another occupant of the car arising from the car being struck by a passing train. *Ibid.*

10. *Railroads — Negligence — Last Clear Chance — Evidence.*—Where the plaintiff's intestate has been killed on the defendant railroad company's trestle by its passing train, and in an action for damages the issue of the last clear chance arises, as to whether the engineer of the defendant, by keeping a proper lookout, could have avoided the injury notwithstanding the intestate's contributory negligence in having placed himself upon the trestle, it is competent for witnesses to testify, from their own knowledge and experience, as to the distance the engineer could have seen the intestate if he had been keeping a proper lookout; and, by those experienced in such matters and familiar with the roadway at the place, the distance within which the train could have been stopped at the place, according to its speed, length and weight. *Hopkins v. R. R.*, 485.

11. *Railroads—Negligence—Last Clear Chance—Proximate Cause—"Lookout."*—In an action to recover damages for the negligent killing of plaintiff's intestate the fact that the intestate negligently went upon the trestle and was there killed by defendant's passing train will not absolve the company from its duty to keep a proper lookout ahead and use proper efforts to stop the train in time to avoid the killing; and if the defendant fails in this duty, and this causes the death, the negligence of the defendant therein is the proximate cause, and fixes its liability. *Bogan v. R. R.*, 129 N. C., 156. *Ibid.*

12. *Railroads—Trespasser—Permissive Use.*—Where a trestle of a railroad company has been used as a passway for a great many years a person injured thereon by a passing train is not regarded as a trespasser, and the company is required to keep a sharp lookout at the place and give timely warning to prevent a collision. *Ibid.*

13. *Railroads—Negligence—Pedestrians—Schedules—Speed of Trains.*—A person using a railroad track for a footway, whether as trespasser or licensee, does so subject to the superior right of a railway company to have the unimpeded use thereof for the operation of its trains while serving the public in transporting passengers and freight; and the railroad company is not under any legal obligation to observe the convenience of such persons in making the schedules of their trains or regulating their speed. *Davis v. R. R.*, 582.

14. *Same—Danger Implied—Presumption.*—Trespassers or licensees using the track of a railroad company as a passway have, from the nature of their surroundings, at least implied knowledge of its danger, and are required to observe a proper degree of care for their own safety in doing so; and the engineer on a passing locomotive may reason-

RAILROADS—*Continued.*

ably expect that a person walking along the track in front. who is in apparent possession of his faculties, will leave the place of danger in time to avoid his own injury by being run upon or struck by the moving train. *Ibid.*

15. *Same—Passing Train—Vortex—Accidents.*—The plaintiff, with a companion, both in full possession of their faculties, were walking along a railroad track paralleling that of the defendant, the plaintiff on the sills outside of the rail, the ends of which sills were 5½ feet from the ends of the sills of the defendant road. The plaintiff's companion informed him of an approaching train, but he continued on his way, and as the train passed he was injured by falling, in some way, beneath it, claiming it resulted from the vortex caused by the train: *Held*, had this been the cause, it was an accident which could not have reasonably been anticipated by the defendant's engineer, and afforded no evidence of actionable negligence. *Ibid.*

16. *Railroads—Negligence—Evidence—Sunday Laws—Movement of Trains—Proximate Cause—Commerce.*—In an action to recover damages for a personal injury alleged to have been caused by the negligent running of the defendant's train, the mere fact that the train was being run on Sunday in violation of a statute of the State is no evidence of a violation by the defendant of its duty owed to plaintiff, injured while using the track as a walkway, and it also lacks the element of proximate cause necessary to sustain a verdict; and this is especially so when the train was an interstate one and not controlled by our statute. *Ibid.*

17. *Railroads—Headlights — Trials — Evidence — Nonsuit — Questions for Jury.*—On a motion to nonsuit upon the evidence the testimony of the defendant will be considered only when it is in the plaintiff's favor; and where the evidence tends to show that the plaintiff's intestate, a section foreman of defendant railroad company, was riding upon a hand-car at night on defendant's track, with other employees, where an approaching train with a headlight would have been seen for miles, and the car was struck by defendant's train coming rapidly upon it without a headlight, and not observed in time for the intestate to have saved himself, and causing death, it is sufficient to be submitted to the jury upon the question of defendant's actionable negligence. Although the intestate was disobeying the orders of the company at the time, his contributory negligence on the facts in evidence was for the jury. *Horne v. R. R.*, 645.

18. *Railroads—Statute—Charter Provisions—Entry Before Condemnation—Rightful Entry—Forcible Trespass.*—A charter to a railroad company with the provision that it shall not be required to institute proceedings for the condemnation of lands prior to the time of entering thereon for the purpose of constructing its road is valid; and where the exercise of this power does not come within the exceptions of Revisal, sec. 2587, as to invading a dwelling-house, yard, etc., the entry upon the land is rightful under the terms of the statute, and does not constitute forcible trespass, though the way is fenced off by the owner, who forbids the entrance with loaded guns. *S. v. Jones*, 753.

RECEIVERS. See Clerks of Court, 1, 3.

1. *Receivers—Orders of Court — Waiver — Mortgages — Disbursement of Funds—Liens.*—Where all parties are before the court and the receiver of an insolvent corporation has sold certain of its property subject to mortgage without objection, under the order of the court, and, likewise under the court's order, has distributed the proceeds among creditors, the mortgagee, or his assignee of the mortgage, by not excepting, waives his right to have the proceeds applied to his own debt, and he cannot have any lien on or priority of payment out of, other funds in the receiver's hands. *Walker v. Lumber Co.*, 460.

2. *Receivers—Mortgages—Liens—Priorities—Laborers — Statutes.*—A receiver of an insolvent sawmill corporation, authorized by order of court to carry on its business, bought timber subject to a prior registered mortgage, under agreement between the parties that he should pay off the mortgage debt in certain proportions out of the proceeds of the sale of the manufactured product: *Held*, the lien given to laborers, etc., for work done, etc., within two months preceding the insolvency of the corporation (Rev., sec. 1206), and the priority under an execution of the judgment (Rev., sec. 1131), are not superior to the lien of the mortgagee, for such superiority of the laborer's lien is acquired where the corporation has given the mortgage on its property. Ch. 150, sec. 2, Laws 1913, requiring the laborer to file notice of his claim before a justice of the peace, has no application. *Ibid.*

RECORDS. See Appeal and Error, 10, 17, 19, 30; Judgments, 2.

REFERENCE. See Appeal and Error, 1; Contracts, 13; Estates, 2.

1. *Reference—Findings—Evidence—Confirmation of Reports—Consideration by Court—Appeal and Error.*—Findings of fact by the referee of the court, supported by evidence, when the report and evidence have been considered by the judge and confirmed, are not reviewable on appeal; and exceptions that the court had not given proper consideration to the report are untenable, it appearing from the judgment that the judge had done so. *Drainage District v. Parks*, 435.

2. *Reference—Scope of Inquiry—Drainage Districts—Conformation and Assessments—Exceptions—Appeal and Error.*—Where, by consent of the parties to an action, the court has ordered a reference for hearing and determining "all matters in controversy," and the controversy has arisen upon exceptions taken by a landowner to the final report on the plan and assessments made in forming a drainage district (ch. 442, Public Laws 1909, sec. 17), the complaining party may not successfully except to the authority of the referees in passing upon questions therein arising which have been referred to them. *Ibid.*

3. *Reference — Rereferences—Scope of Inquiry—Reports—Charges.*—The court has the authority to rerefer the referee's report, and thereunder the referee may change, correct or add to his former report. *Walker v. Lumber Co.*, 460.

4. *Reference—Pleas in Bar—Limitation of Actions.*—A plea in bar must be to the "whole action" or to the "entire cause of action," to require that it be determined before reference ordered; and when it appears that the reference involved taking a mutual account between the

REFERENCE—*Continued.*

parties, of long standing, for services charged and payments made, extending to a short time before the commencement of the action, a reference was proper; and upon the findings of the referee, confirmed by the trial court, in this case, the action was not barred by the statute. *Stancil v. Burgwyn*, 124 N. C., 69. *Alley v. Rogers*, 538.

5. *Reference—Jury—Waiver.*—A party objecting to a compulsory reference waives his right to a trial by jury by failing to assert it definitely and specifically in each exception to the report and to file the proper issues he desires to be submitted to them. *Ibid.*

6. *Reference — Findings — Appeal and Error.*—Findings of fact by the referee, supported by sufficient evidence and confirmed by the trial judge, are conclusive on appeal. *Ibid.*

REFORMATION. See Contracts, 10; Equity, 1; Limitation of Actions, 3.

Reformation of Instruments—Equity—Deeds and Conveyances—Mistake. A deed will not be reformed for mutual mistake of the parties and the draftsman, in the absence of evidence that all of the parties thereto or the draftsman participated in the mistake alleged. *Dickey v. Cooper*, 489.

REGISTRATION. See Appeal and Error, 19; Bankruptcy, 1; Deeds and Conveyances, 1, 9, 28; Elections, 1, 2; Equity, 2; Vendor and Purchaser, 1.

Registration—Maps—Title—Color—Unregistered Deeds.—A plat or map of lands professes to pass no title to the lands platted, and does not constitute color of title thereto; and the registration of the map cannot supply the lack of the registration of the deed conveying the lands platted. *Realty Co. v. Carter*, 5.

REGULATIONS. See Carriers of Goods, 8.

REHEARING, RULES ON. See Preface.

RELEASE. See Easements, 3; Judgments, 12.

REMANDING CAUSE. See Appeal and Error, 28.

REMOVAL OF CAUSES.

1. *Removal of Causes—Transfer of Causes—Motions — Refusal — Exceptions—Waiver.*—Where a defendant moves to transfer a cause to another county, and he is allowed to a certain day of the term to file affidavits, which he failed to do, and his motion for removal is denied, without his excepting or appealing, his conduct will waive all of his rights thereto. *Oettinger v. Live-stock Co.*, 152.

2. *Transfer of Causes—Court's Discretion—Appeal and Error—Interpretation of Statutes.*—The transfer of a cause to another county "for the convenience of witnesses or for that the ends of justice will be promoted," is a matter within the discretion of the trial judge and not reviewable on appeal. Revisal, sec. 425. *Ibid.*

3. *Transfer of Causse — Continuances — Waiver.*—A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. *Ibid.*

4. *Same — Answer — Judgments by Default.*—Where a defendant has waived his right to transfer a cause to another county or the same

REMOVAL OF CAUSES—*Continued.*

has been refused in the discretion of the trial court, and he has permitted the time to file his answer to expire, it is within the discretion of the trial judge to refuse his motion to file an answer later, and a judgment final by default thereof may be entered in proper instances. *Ibid.*

5. *Transfer of Causes — Removal of Causes — Plaintiff's Residence—Administrators and Executors—Court's Discretion — Statutes.*—Where a plaintiff alleges that he is a resident of a certain county wherein he has brought his action to recover for services he has rendered personally to the defendant, the administrator of a deceased person (Rev., sec. 424), it is a matter within the unreviewable discretion of the trial judge as to whether he will transfer the cause for trial to the county wherein the defendant resides, and which had been the residence of the deceased, upon the latter's motion, on the sole ground that "the convenience of the witnesses and the ends of justice would be promoted." Revisal, sec. 425 (2). *Craven v. Munger*, 424.

6. *Removal of Causes—Transfer of Causes—Fair Trial—Court's Discretion—Appeal and Error.*—A motion to transfer a cause from one county to another in the interest of justice is addressed to the sound discretion of the trial judge, and is not reviewable on appeal. *Byrd v. Spruce Co.*, 429.

7. *Removal of Causes—Diversity of Citizenship—Fraudulent Joinder of Parties—Jurisdictional Amount—Denial of Allegations—Pleadings.*—Where the petition to remove a cause from the State to the Federal court for diversity of citizenship and the fraudulent joinder of a resident defendant is sufficiently specific in its allegation as to the fraudulent joinder, but the complaint alleges that the cause of action accrued since the enactment of the Federal statute raising the amount to a sum exceeding $3,000, etc., necessary to confer jurisdiction on the Federal court, and lays the damages at $3,000, and no facts are stated in the petition to sustain the charge that the allegation in the complaint as to the time the cause of action accrued is fraudulent, the petition for removal will be denied. The relative duties and jurisdictions of the State and Federal courts upon such motions pointed out by ALLEN, J. *Cogdill v. Clayton*, 526.

REPUTATION. See Evidence, 25, 26.

RES GESTÆ. See False Imprisonment, 3; Principal and Agent, 3; Homicide, 21.

RESIDENCE. See Receivers, 1; Removal of Causes, 5.

RESISTING OFFICER. See Arrest, 1, 2.

RESTRAINT ON ALIENATION. See Wills, 27.

REVERSIBLE ERROR. See Appeal and Error; Carriers of Goods, 9.

RIGHTS OF WAY. See Carriers of Passengers, 1; Deeds and Conveyances, 12, 13; Easements, 1, 2, 3, 4, 5.

REVISAL. (See various headings of subjects for greater accuracy.)

SEC.

59. Payment in lifetime of deceased for injury resulting in death bars action for consequent and further injury to his estate. *Edwards v. Chemical Co.*, 551.

216. Reversible error for trial judge to prohibit attorneys from reading Supreme Court decisions in argument to jury. *Howard v. Tel. Co.*, 495.

326 (3). This section does not affect section 4809 as to time for bringing action on policy of fire insurance. *Holly v. Assur. Co.*, 4.

361. A "speaking demurrer" to complaint is bad. *Moody v. Wike*, 541.

370. This section applies when action would otherwise be barred. *Grimes v. Andrews*, 515.

375. Prior to 1911 a municipality could not reassert title lost by adverse possession except under power of eminent domain. *Threadgill v. Wadesboro*, 641.

381. Prior to 1911 a municipality could not reassert title lost by adverse possession except by eminent domain. *Ibid.*

395 (9). Statute begin to run from time the fraud should reasonably have been discovered; absence of creditor from State is not contemplated by the statute. *Ewbank v. Lyman*, 505.

424. Venue of action may be in residence county of receiver of insolvent corporation. *Biggs v. Bowen*, 34.

424-5 (2). Personal action against administrator brought in county of plaintiff's residence is removable in the court's discretion. *Craven v. Munger*, 424.

425. Transfer of cause for convenience, etc., is within discretion of trial judge. *Oettinger v. Live-stock Co.*, 152.

495. Variance between proof and pleadings must be prejudicial to constitute error; and pleadings will be liberally construed. *Renn v. R. R.*, 128.

495. Discretionary with trial judge to permit amendment for mistake in designating parties. *Rosenbacher v. Martin*, 236.

502. Without plea of justification or mitigating circumstances, evidence of the truth of a charge is incompetent in an action for slander. *Burris v. Bush*, 394.

507. An amendment when germane and which does not add new cause of action should be permitted, and then relates back to commencement of the action. *Lefler v. Lane*, 181.

507. Discretionary for trial judge to permit amendment for mistake in designating parties. *Rosenbacher v. Martin*, 236.

509. Discretionary for trial judge to permit amendment for mistake in designating parties. *Ibid.*

510. Discretionary for trial judge to permit amendment for mistake in designating parties. *Ibid.*

513. Judgment regularly entered will not be set aside after a year for excusable neglect. *Lee v. McCracken*, 575.

515. Upon material variance between proof and pleadings court may allow amendments upon terms imposed; and if immaterial variance,

REVISAL—*Continued.*

SEC.

may direct verdict according to the evidence. *Deligny v. Furniture Co.*, 189.

559. This section has no application in computing time under agreement between parties as to serving case, etc., on appeal. *Land Co. v. Chester*, 399.

587. An appeal lies from an order allowing alimony and counsel's fees to the wife in action for divorce. *Garsed v. Garsed*, 672.

629-30. One taking proceeds of sale of land after an estate for life takes as personalty not subject to prior levy. This section does not apply. *Clifton v. Owens*, 607.

686. Sole conveyance of husband conveys wife's homestead, but not wife's right of dower. *Finch v. Cecil*, 72.

938. Unregistered conveyances not good against trustee's title under the Bankrupt Act. *Hinton v. Williams*, 115.

952. Before Martin Act, 1911, without privy examination, married woman could not make executory contract to charge her separate realty. Damages now recoverable. *Warren v. Dail*, 406.

962. Land conveyed to husband and wife purchased by husband is not fraudulent as to latter's creditors when he has retained sufficient property, etc. *Finch v. Cecil*, 114.

974. An oral promise to save harmless a lessee, with privilege of purchase, is void. *Gilmer v. Improvement Co.*, 452.

980. Lien of judgment has priority to conveyance of land subsequently registered. *Realty Co. v. Carter*, 5.

1131. The execution does not give priority of lien when the mortgage was not given by the corporation. *Walker v. Lumber Co.*, 460.

1206. The priority of lien given by this section applies only where the corporation has given the mortgage. *Walker v. Lumber Co.*, 460.

1264. Where plaintiff seeks to enjoin foreclosure by mortgagee, and it is ascertained he owes a balance, and time for redemption is extended, taxing of costs is in court's discretion. *Yates v. Yates*, 533.

1266-7. Where plaintiff seeks to enjoin foreclosure by mortgage, and it is ascertained he owes a balance, and time for redemption is extended, taxing of costs is in court's discretion. *Ibid.*

1279. In this case, the liens of laborers being recoverable, they are entitled to costs. *Hogshed v. Lumber Co.*, 529.

1379. County commissioners may employ expert accountants and direct their payment out of county funds, without approval of county auditor, under public-local law. *Wilson v. Holding*, 352.

1562. The wife is entitled to alimony and counsel's fees only when she brings herself within the provisions of this section. *Garsed v. Garsed*, 672.

1583. A devise to widow and to heirs of son, living at time, and children at death of testator, and one born thereafter: *Held*, after-born child took with other children of J. *Cooley v. Lee*, 18.

1693-4-5. In this case the swamp lands were held as a matter of law, as coming within the acreage prescribed. Swamp lands defined. *Beer v. Lumber Co.*, 337.

REVISAL—*Continued.*

SEC.

1951. Penalty for usury is recoverable against payee of note taken for the usurious amount who has obtained judgment against endorser thereon. Payee, being a nonresident, statute does not run. *Cuthbertson v. Bank*, 531.

2016. Lien of materialmen furnished to husband and wife attaches to land held by them in entireties. *Finch v. Cecil*, 72.

2094. Before Martin Act, 1911, without privy examination, married woman could not make executory contract to charge her separate realty. Damages now recoverable. *Warren v. Dail*, 406.

2107. Before Martin Act, 1911, without privy examination, married woman could not make executory contract to charge her separate realty. Damages now recoverable. *Ibid.*

2112-3. Before Martin Act, 1911, married woman could not, without privy examination, make executory contract to charge her separate realty. *Ibid.*

2204. Title to negotiable instrument not alleged defective, endorsement to holder makes *prima facie* case. *Moon v. Simpson*, 335.

2208. Title to negotiable instrument not alleged defective, endorsement to holder makes *prima facie* case. *Ibid.*

2587. A railroad may enter lands under provision of statute, with the statutory exceptions, before condemnation or payment, without being a trespasser. *S. v. Jones*, 753.

2634. Consignor must file claim at origin of shipment in order to recover the penalty. *Grocery Co. v. R. R.*, 241.

2634. Undisclosed principal may recover penalty as party aggrieved. *Horton v. R. R.*, 383.

2643. This section, imposing a penalty, is inoperative under the Federal laws. *Hardware Co. v. R. R.*, 395.

2644. This section, imposing penalty, is inoperative under Federal laws. *Ibid.*

2684-5. Injunction against county commissioners at suit of taxpayers, from building road without notice, will not lie. *Edwards v. Comrs.*, 448.

2773. In this case clerk is held to be entitled to commissions on selling lands and reinvesting, etc., though chargeable with some interest. This section not applicable. *Hannah v. Hyatt*, 634.

2836. This section does not cover the provisions of section 2923. *S. v. Medlin*, 682.

2866. Municipality may collect back taxes authorized by statute by direct action to foreclose lien. *Wilmington v. Moore*, 52.

2923. Municipalities may prohibit Sunday opening for business, except drug stores, and prevent sales of soft drinks, tobacco, etc., within certain hours. *S. v. Medlin*, 682.

2949. This section is for purpose of revising registration. *Hardee v. Henderson*, 572.

3113. Testator's signature to will need not be subscribed. *Peace v. Edwards*, 64.

3126. Requirements of this section did not obtain under the old practice, and where clerk transcribed will thereunder, its proper probate and transcription is presumed. *Poplin v. Hatley*, 163.

REVISAL—*Continued.*

SEC.

3139, ch. 219, Laws 1915, amending Revisal, has no application to facts of this case. *Cooley v. Lee*, 18.

3244. Trial judge should be requested to order bill of particulars when means of committing criminal offense are not sufficiently averred. One charged with arson may be convicted of less offense. *S. v. Stephens*, 745.

3254. Motion to arrest judgment on conviction of a crime, because means of offense was not specificially averred, should be denied when sufficient matters appear. *Ibid.*

3254-5. The charge that prosecutrix was "innocent virtuous" woman, in action for seduction is not fatally defective for omission of the word "and." *S. v. Ratliff*, 707.

3434a. One who has received a boarder at his home, unlicensed, and who does not hold his place out as a boarding-house, does not keep a boarding-house within the meaning of this section, making one who leaves without paying his bill, etc., guilty of an offense. *S. v. McRae*, 712.

3664-5. Growing crops are within the meaning of this section, and the landlord's unlawful seizure is indictable. *S. v. Townsend*, 696.

3688. An instruction to find defendant guilty of trespass after being forbidden is erroneous under evidence that he peaceably entered under a reasonable claim of right. *S. v. Faggart*, 737.

4115. This section, as amended, gives board of education discretionary power to "approve" election upon petition abolishing school district, not reviewable by the courts. *Key v. Board of Education*, 123.

4323. This section is for purpose of new registration. *Hardee v. Henderson*, 572.

4809. Provisions in policy of fire insurance as to time for bringing suit are valid and not affected by Revisal, 326 (3). *Holly v. Assur. Co.*, 4.

ROAD DISTRICTS.

Road Districts—Bond Issues—Disputed Highways—County Commissioners—Statutes.—Chapter 193, Public-Local Laws 1915, created a board of highway commissioners for certain townships of Swain County, authorizing them to construct a designated trunk highway and feeder roads, etc., and use the proceeds of a certain bond issue for the purpose: *Held*, the erecting, repairing, and maintaining all public bridges and culverts in the county not upon the trunk line or branches in course of construction are within the duties of the county commissioners, and not within the duties or subject to the control of the highway commissioners. *Patterson v. Comrs.*, 503.

ROADS AND HIGHWAYS.

1. *Roads and Highways—Relocation — Injunction — Damages—Appeal—Constitutional Law.*—By provision of ch. 201, Laws 1907, relating to the public roads of Cabarrus County, the superintendent is empowered to locate, relocate, widen or otherwise change any public road or part thereof, after filing a petition and map with the board of county commissioners, containing estimated cost and other data, and the superintendent is also required to notify the landowners, who are

ROADS AND HIGHWAYS—*Continued.*

allowed the right of appeal from the order of the commissioners, providing for a trial *de novo* in the Superior Court, and for the award of compensation, but that the appeal shall not delay the construction of the road. In this suit to restrain the construction of a proposed relocation, it appeared by affidavit that it would cause permanent and serious damage to the plaintiff's land, and, in defendant's behalf, that the old road could not properly be kept up on account of springs, a watercourse and the low lay of the land, and that the proposed relocation had been worked on with expense, and that the public convenience of travel required it: *Held*, an order restraining the relocation of the road to the hearing was properly dissolved. *Scott v. Comrs.*, 327.

2. *Roads and Highways—Bonds—Subsequent Legislation—Restrictive as to Time—Constitutional Law—Statutes.*—An act forbidding the issu-

ROADS AND HIGHWAYS—*Continued.*

ance of bonds, theretofore authorized by the Legislature upon the approval of the voters, in a newly created road district, after designated time, in this case twelve months from its enactment, is constitutional and valid, and the bonds thereafter issued are void, and there is no authority in the road commissioners to ratify them. *Highway Commission v. Construction Co.*, 513.

3. *Roads and Highways—Working Roads—Payment of Money—Statutes—Constitutional Law.*—A statute imposing a duty upon citizens of a township or road district between the ages of 21 and 45 years to work the public roads therein is constitutional and valid, and the act may make it optional that the citizens either work the roads when notified under the terms of the statute or pay a sum certain in lieu thereof to be applied to the working of the roads. *S. v. Taylor*, 693.

4. *Same—Taxation — Constitutional Equation — Constitutional Law.*—A statutory requirement that citizens of a township or road district shall work the roads therein for four days or pay a sum of $4, to be used for that purpose, is not a capitation tax or subject to the constitutional equation. *Ibid.*

5. *Roads and Highways—Working Roads—Public Policy—Statutes.*—The working of public roads in the State or requiring payment of money in lieu thereof is a part of the public policy of the State within legislative control. *Ibid.*

ROUTINGS. See Carriers of Goods, 7.

RULE IN SHELLEY'S CASE. See Wills, 28.

RULE OF COURT ON REHEARINGS. See Preface.

RULES OF COURT. See Appeal and Error, 10, 17, 27.

SAFE APPLIANCES. See Master and Servant, 3, 4, 5, 13.

SAFE PLACE TO WORK. See Master and Servant; Railroads, 1.

SALARIES AND FEES. See Public Officers, 2.

SALES. See Contracts, 13; Costs, 1; Equity, 4; Escheat, 1, 2; Judicial Sales, 1; Mortgages, 1, 2, 3, 4; Wills, 6.

SCHOOL DISTRICTS.

1. *School Districts—Discretionary Powers—Mandamus.*—The courts may compel the county board of education to act upon discretionary powers conferred on them by the Legislature, but cannot tell them how they must act. *Key v. Board of Education*, 123.
2. *Same—Elections—Abolishing District — Endorsement and Approval—Interpretation of Statutes.*—Revisal, sec. 4115, as amended by chapter 524, Laws 1909, and chapter 135, Laws 1911, requires that where school districts have been established, the question of revoking the tax and abolishing the district shall be submitted to the electorate of the district upon a petition of two-thirds of the qualified voters therein, when endorsed and approved by the county board of education: *Held*, the requirement that the endorsement and approval of the board of education shall first be had confers on this board the exercise of a judicial or discretionary power necessarily implied from the use of the word "approved," and where it has acted upon the petition and in the unarbitrary exercise of this power has refused to order the election, the courts are without authority to compel them by *mandamus* to "endorse and approve" the election proposed. *Ibid.*
3. *Same—Prerequisites—Statutory Requirements.*—It is a prerequisite to the valid ordering of an election by the county commissioners upon the question of revoking the tax and abolishing a school district, that the statutory requirements be first met, *i.e.*, that the petition be signed and endorsed and approved by the county board of education as specified by the statutes; and such election otherwise ordered by the county commissioners will be ineffectual. *Ibid.*

SEAL OF STATE. See Grants; Public Lands.

SEARCH AND SEIZURE. See Criminal Law, 24; Intoxicating Liquors, 10, 12.

SEDUCTION. See Criminal Law, 20, 21, 22; Indictment, 1.

SELF-DEFENSE. See Homicide, 27, 29, 30.

SHERIFFS. See Public Officers, 2, 3.

SIDEWALKS. See Injunction; Municipal Corporations.

SLANDER.

1. *Slander—False Pretense — Evidence — Trials — Questions for Jury.*—Where there is evidence in an action for slander, that the defendant told a witness that the plaintiff had obtained the defendant's property by false pretense, on an occasion not claimed to be privileged, and justification is not pleaded, the crime of false pretense being punishable by imprisonment in the penitentiary, is a charge of an infamous offense, which is actionable *per se*, and affords evidence sufficient to sustain the action. *Hadley v. Tinnin*, 84.
2. *Same — Witness — Conflicting Testimony.*—An action will not be dismissed upon failure of evidence to sustain it, when it depends upon

SLANDER—*Continued.*

the testimony of a certain witness and is sufficient on direct examination, though the witness weakened his evidence on defendant's cross-examination, for it is for the jury to determine the truth of the matter under conflicting evidence of this character. *Ibid.*

3. *Same—Express Malice—Evidence.*—Evidence in an action for slander is sufficient to show express malice when it tends to show that the defendant had consulted with a justice of the peace before swearing out the warrant against the plaintiff, and was advised that the criminal charge would not hold; that they agreed that the plaintiff was not financially responsible, and at the request of the defendant the magistrate withheld issuing the warrant to see if the plaintiff would return defendant's horse the latter alleged was taken from him by false pretense; that when this was not done and the warrant finally issued, the defendant said he would get even with the plaintiff if it cost him $1,000. *Ibid.*

4. *Slander—Pleas—Justification — Evidence — Statutes.*—Where there is no plea of justification or of mitigating circumstances, in an action for slander, evidence of the truth of the charge is incompetent. Revisal, sec. 502. *Burris v. Bush*, 394.

STATEMENTS. See Criminal Law, 12, 13; Homicide, 11.

STATE'S LANDS. See Grants; Public Lands.

STATUTES. See Drainage Districts, 1, 8, 11; Easements, 5; Elections, 1, 2; Evidence, 1, 10, 15; Grants; Husband and Wife, 3; Insurance, 1; Intoxicating Liquors, 1, 2, 5, 6; Judgments, 1, 9; Landlord and Tenant, 1; Liens, 1; Limitation of Actions, 1, 2, 4, 7, 9; Married Women, 1, 2, 4, 6; Mechanics' Liens, 1, 2; Municipal Corporations, 1, 2, 6, 10, 14, 21, 22; Parties, 2; Pleadings, 1, 2, 3, 7; Public Lands, 1, 2; Appeal and Error, 12, 24; Bankruptcy, 1; Bills and Notes, 3; Carriers of Goods, 4; Costs, 1; County Commissioners, 1, 3, 4; Deeds and Conveyances, 1, 21; Public Officers, 1, 2, 3; Public Roads, 1, 2, 3; Receivers, 1, 2; Removal of Causes, 2, 5; Roads and Highways, 2, 3, 4, 5; School Districts, 2; Slander, 4; Uses and Trusts, 1; Vendor and Purchaser, 1; Wills, 1, 2, 13, 14, 16, 20, 21; Convicts; Courts, 7; Criminal Law, 14, 16, 19, 22, 24; Indictments, 1, 2; Railroads, 18.

1. *Statutes — Legislative Powers — Back Taxes — Levy and Sale — Direct Action—Interpretation of Statutes.*—Where the Legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes of the defendant are due, were properly assessed against lots of land within the limits of the municipality subject to the lien therefor, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien. Revisal, sec. 2866. *Berry v. Davis*, 158 N. C., 170, cited and distinguished. *Wilmington v. Moore*, 52.

2. *Death, Wrongful — Interpretation of Statutes—Survival of Actions.*—Revisal, sec. 59, changes the common-law rule by conferring a right of action aaginst one who has wrongfully caused the death of another, and where the injured party has received in his lifetime full compensation for the injury which resulted in his death, a right of

STATUTES—*Continued.*

action arising from the same injury will not lie after his death for further damages for the benefit of his estate, the same neither existing at common law nor conferred by a reasonable interpretation of the language of the statute. *Edwards v. Chemical Co.*, 551.

3. *Same—Pleadings.*—Where it appears from the pleadings in an action brought under the provisions of Revisal, sec. 59, for damages for a wrongful death, that the answer pleads a recovery by the party injured, before his death, upon the same cause of action, and that his judgment had been paid, to which the plaintiff demurred, it is *Held*, that the demurrer admitted the facts stated in the answer, and the present plaintiff, administrator of the deceased, cannot recover. *Ibid.*

4. *Interpretation of Statutes — General and Local Statutes — Repealing Statutes.*—A general legislative enactment will not ordinarily be construed by the court to repeal by implication an existing particular statute, or one local in its application; but where it is plainly manifest from the terms of the general law that such was the intention of the Legislature, the intent so found will prevail and effect a repeal of the special statute, when in conflict therewith. *S. v. Johnson*, 685.

5. *Same — Intoxicating Liquors — Criminal Law.*—Our prohibition laws, sec. 7, ch. 71, Laws 1908, and sec. 8, ch. 44, Laws 1913, contain the same repealing clauses, that nothing therein contained "shall operate to repeal any of the local or special acts of the General Assembly prohibiting the sale or manufacture of any of the liquors mentioned in this act; but all such acts shall continue in full force and effect and in concurrence herewith; and indictments or prosecutions may be had under this act or any special or local act relating to the same subject." *Held*, it was the intention of the Legislature, in carrying out the public policy of the State, to adopt a uniform rule in regard to the sale of liquor, and that the special or local laws passed in respect thereto must conform to the general provisions of the act, and where, by a former special or local act, the sale of wines of not less than two gallons to a package, under certain conditions, was made unlawful, this provision was in conflict with the terms of the general statute prohibiting a sale of less than two and a half gallons to the package. *S. v. Swink*, 151 N. C., 726, cited, discussed, and applied. *Ibid.*

6. *Same—Indictment.*—Where a general law fixes the minimum quantity of wines to be sold in the State, under certain conditions, at two and a half gallons, and a prior statute of local application has fixed the quantity at two gallons, and the former of the statutes provides that the local laws shall continue in force and effect in "concurrence" therewith: *Held*, the local act should be brought into consistency with the general law and read in harmony therewith, so that an indictment will lie for the sale of the wines in less quantity than two and one-half gallons to a package. *Ibid.*

7. *Interpretation of Statutes—Ambiguity—Intent — Results.*—Where the language of a statute is ambiguous, admitting of two constructions, that interpretation will be given it which will best tend to make the statute effectual and to produce beneficial results intended by its general terms, in preference to the one which will defeat its purpose or be productive of actual mischief. *Ibid.*

STATUTES—*Continued.*

8. *Interpretation of Students—Particular and Local Statutes—Definition.* A local law is one which pertains to a particular place or to a definite region or portion of space, or is restricted to one place; and a special law is one that is different from others of the same kind or designated for a particular purpose, or is limited in range or confined to a prescribed field of action or operation. *Ibid.*

9. *Trials—Verdicts—Immaterial—Answers — Criminal Law.*—Where the jury have found by their verdict that the defendant was guilty under the charge of the court of violating the prohibition law by the sale of wines in packages of less than two and one-half gallons, with further statement that they did so only in deference to the charge of the court, and the charge given was clear and correct, the guilt of the prisoner is not affected by the further finding of the jury. *Ibid.*

STATUTE OF FRAUDS. See Contracts, 2, 3, 4; Trusts and Trustees, 1.

STENOGRAPHER'S NOTES. See Evidence, 23.

STREETS. See Deeds and Conveyances, 22, 23; Evidence, 18, 26; Executors and Administrators, 1; Municipal Corporations; Trials, 4.

STREET RAILWAYS. See Carriers of Passengers, 1, 2, 3; Injunction; Municipal Corporations, 7.

SUBROGATION. See Equity, 5, 6.

SUNDAY. See Municipal Corporations, 20, 21, 22, 23; Railroads, 16.

SUPREME COURT. See Injunction.

SURETIES. See Clerks of Court, 1.

SURVIVORSHIP. See Husband and Wife, 1.

SWAMPS. See Public Lands, 1, 2.

TAXES. See Constitutional Law, 1; County Commissioners, 6; Roads and Highways, 4; Statutes, 10.

TELEGRAPHS. See Issues, 2.

1. *Telegraphs—Free Delivery Limits—Extra Charge Paid—Negligence—Evidence — Questions for Jury.*—Where a telegraph company has wired back to the sending point and asked for extra payment for delivery beyond the free delivery limits of the terminal office, which is made by the sender at 8:30 o'clock a.m., and the message is not delivered at a distance of two and one-half miles until 10:30 o'clock of the same day, the transmission of the message by wire being local, the case should be submitted to the jury upon the question of the defendant's negligence in not sooner delivering the message. *Gainey v. Tel. Co.*, 7.

2. *Telegraphs — Principal and Agent — Declarations — Trials—Evidence Contradictory.*—Where negligence is alleged in an action to recover of a telegraph company damages for not promptly transmitting and delivering a message announcing a death, testimony that the defendant's agent said, at the time, that the message was not delivered be-

TELEGRAPHS—*Continued.*

cause he did not know where the sendee lived, is competent when contradictory of his evidence given at the trial. *Ibid.*

3. *Telegraphs—Measure of Damages—Hiring Conveyance—Trials—Questions for Jury.*—In an action to recover damages of a telegraph company for its negligent delay in the transmission and delivery of a telegram, where the evidence in defendant's behalf tends to show that the plaintiff could have avoided the damages by hiring a conveyance for $5, and, in plaintiff's behalf, that he would have paid more than the $5, but did not have the money to hire the conveyance, the question of the amount of damages, upon the negligence of the defendant being shown, is one for the jury, and not limited to the $5 for which the conveyance could have been hired; and the charge of the court in this case, leaving it for the jury to determine whether the plaintiff could have taken the conveyance, is proper. *Ibid.*

TENANTS IN COMMON. See Estates, 1.

TENDER. See Mortgages, 1; Trials, 2.

TERM. See Appeal and Error, 2.

THREATS. See Homicide, 13.

TIMBER DEEDS. See Equity, 2.

TORTS. See Negligence, 9.

TRANSFER OF CAUSES. See Removal of Causes.

TRESPASS. See Equity, 7; Railroads, 12, 18; Criminal Law, 16.

TRIALS. See Appeal and Error, 3; Attorney and Client, 1; Attorneys, 1; Bills and Notes, 2; Carriers of Goods, 7; Commerce, 1; Common Carriers, 2; Courts, 5; Deeds and Conveyances, 6, 12, 29; False Imprisonment, 2; Malicious Prosecution, 2; Master and Servant, 1, 2, 3, 5, 10, 11, 12, 13, 15, 18; Municipal Corporations, 8; Negligence, 2, 3, 4, 7, 8, 10, 11; Principal and Agent, 1; Questions for Jury, 1; Railroads, 17; Slander, 1, 2, 3; Wills, 5, 18; Criminal Law, 16, 23; Homicide, 9, 10, 24, 26.

1. *Trials—Issues—Forms—Appeal and Error.*—The form of issues submitted by the court to the jury is immaterial, and the refusal of the court to submit issues tendered and which are proper ones will not be held as error when the issues submitted relate to the evidence introduced at the trial and were sufficient for the determination of every phase of the controversy. *Kerner v. R. R.*, 94.

2. *Trials — Insurance — Loan Notes—Tender—Costs.*—The defendant, in this action on a policy of life insurance, having a right under a valid contract of insurance to pay off a loan note out of the proceeds of the matured policy, tendered a judgment to the plaintiff of the difference between this amount and the face value of the policy: *Held*, the defendant should be taxed with the costs theretofore accruing, and the plaintiff with the cost thereafter. *Cowles v. Assurance Society*, 368.

3. *Trials—Instructions—Burden of Issues—Burden of Proof.*—Where in an action to recover lands the trial court has placed the burden of

TRIALS—*Continued.*

the issue on the plaintiff, and instructs the jury that he must establish his title by the greater weight of the evidence, and that if he had done so, then the burden of proof was on the defendant to establish his title by adverse possession under color, the charge does not shift the burden of the issue from the plaintiff, and it is not objectionable. *Smathers v. Jennings*, 601.

4. *Trials — Negligence — Instructions — Municipal Corporations—Streets and Sidewalks—Appeal and Error.*—The defendant plumbing company, in connecting sewerage for a private owner with the system of the city, made a ditch 2 to 2½ feet deep, about 23 December, across a much frequented sidewalk, into which the plaintiff fell and was injured about 6:30 or 7 p.m. on 31 December following. The defendant requested the court to charge the jury that if it filled in and well tamped the hole on the day it was dug, and it did not exist until noon of the 31st, it would not be guilty of actionable negligence. *Held*, the prayer was properly refused, as it excluded the inference, under the evidence, that its hands should have discovered and protected the place on the 31st while at work there, or that the ditch had been negligently dug, thus causing the cave-in. *Seagraves v. Winston*, 618.

5. *Trials—Railroads—Condemnation—Argument—Damages — Speculative Values—Appeal and Error.*—Argument of counsel on speculative values for the lands taken for railroad purposes in condemnation proceedings will not be considered as ground for reversible error on appeal when it appears that the trial court, at the time of the objection, corrected any erroneous impression they may have made on the jury and afterwards instructed them not to consider anything not based on the evidence in the case relating thereto. *Land Co. v. Electric Co.*, 674.

6. *Trials—Evidence — Motion to Strike Out — Appeal and Error — Objections and Exceptions.*—Where testimony has been given on the trial of an action without objection, it is within the discretion of the trial judge to strike it out on motion thereafter made. *S. v. Wilkes*, 735.

7. *Trials — Instructions — Contentions — Appeal and Error.*—Where the guilt or innocence of a defendant charged with violating our prohibition law is properly submitted to the jury as a matter of fact to be found by them, under a charge free from error, exception that the court did not fairly state the defendant's contention will not be sustained on appeal. *S. v. Cathey*, 794.

TRUSTEES. See Bankruptcy, 1; Courts, 1.

TRUSTS. See Deeds and Conveyances, 2, 17, 18; Levy, 1, 2; Parties, 3; Wills, 23.

Trusts—Deeds and Conveyances—Parol Trusts—Burden of Proof—Quantum of Proof.—The vendee of a purchaser of lands at a judicial sale by deed purporting to convey the fee brought his action for the possession thereof, and the defendant sought to engraft on the title a parol trust in his favor, contending that the purchaser had bought the land under agreement that he would convey the same to the defendant upon being reimbursed his expenditures: *Held*, the presumption of law is strongly in favor of the correctness of the deed, and it

TRUSTS—*Continued.*

is required that the defendant establish his case by clear, strong, and convincing proof; and a charge of the court that he must do so by the preponderance of the evidence is reversible error. *Grimes v. Andrews*, 515.

TRUSTS AND TRUSTEES.

1. *Trusts and Trustees—Grantor—Parol Trusts — Evidence — Statute of Frauds.*—A grantor of a fee-simple title in lands cannot engraft upon that title a parol trust in the lands in his own favor, for such is a contradiction of the writing by parol inhibited by the statute of frauds. *Campbell v. Sigmon*, 348.
2. *Trusts and Trustees—Wills—Investments—Securities Directed—Courts.* Construing a devise to the wife of the testator's estate until she should die or remarry, with remainder to his children upon the happening of either event, and directing, among other things, that the property not applied or necessary to be spent for his children should be invested in Government securities, paying each child his part upon arrival at 21 years of age, it is held, the clause of the will as to investments seems to refer to any surplus which might accumulate in case the widow should die or remarry, over the current needs of the family; and where the estate has become involved, and in a proper suit, a trustee has been appointed to manage it, the court may sanction a departure from the investment directed when such becomes proper for the preservation of the estate. *Fisher v. Fisher*, 378.
3. *Trusts and Trustees—Commissions Allowed.*—It appearing in this case that the trustee in the management of an estate exceeding $100,000 was required to give the principal part of his time to his duties, furnishing office force, stationery, etc., at his own expense; that the estate increased under his management, and its income was greatly enhanced; that he had built six business stores, etc., it is held that an allowance of five per cent to him on the amount of the estate and the accruing income, made by the court and approved by the life tenant and one of the remaindermen authorized under the will to have a voice in the management, is not unreasonable, and will not be disturbed on appeal. *Ibid.*
4. *Trusts and Trustees—Courts—Investments Allowed—Excess—Rule of Prudent Man.*—The trustee of a large estate was authorized by the court to spend $50,000 in a modern building in a city, and therein expended in excess thereof a sum exceeding $9,000. In this suit it is charged that the building was an unwise investment and unauthorized as to the excess over the sum allowed by the court, for which the trustee should personally be charged. It is not charged that the estate did not receive the benefit of this extra expenditure or that it was an undesirable outlay. It appeared also that it had been reported to the court from time to time as the building progressed. and approved: *Held*, the trustee is not always held to be assured judgment in the management of a trust fund or making an investment, but to the exercise of the sound discretion of the prudent man, and the exception was properly overruled. *Ibid.*
5. *Trusts and Trustees—Investments — Personal Interests.*—The trustee of a large estate invested $8,000 of the trust fund in a bank of which he was president, and it is charged that the return upon this invest-

TRUSTS AND TRUSTEES—*Continued.*

ment was inadequate. This investment was made under authority of court and approved by the administratrix with the will annexed and the owner of the life estate, to which the principal, with some interest, has been returned: *Held*, while a trustee must account either for profits or legal rate of interest for trust funds invested in his own individual enterprise, this principle will not apply to the circumstances of this case. *Ibid.*

6. *Same—Insurance Premiums.*—The trustee was allowed commissions on insurance premiums taken out by him for the benefit of the estate, to which exception was taken that he was interested in the agencies issuing them. There was nothing to show that the insurance carried was not in the exercise of good business judgment, or that the premium rate was not that ordinarily charged for the class of risk assumed: *Held*, the exception was properly overruled. *Ibid.*

ULTRA VIRES. See Banks and Banking.

UNDISCLOSED PRINCIPAL. See Carriers of Goods, 5.

USES AND TRUSTS.

Uses and Trusts—Statutes—Title.—Where lands are conveyed to trustees, without specifying any conditions, the statute will execute the trust by transferring the possession to the use, and the *cestui que trust* will acquire the entire estate. *Gold Mining Co. v. Lumber Co.*, 273.

USURY.

1. *Usury—Bills and Notes — Judgments—Credits—Principal and Surety.* Where a borrower of money from a bank has paid an usurious rate of interest, and has the bank to accept in settlement of the indebtedness then existing another note of his with endorsers, against the latter of whom the bank obtained judgment, it is held that the maker is entitled, in an action against the bank, to recover twice the amount of the usurious interest paid (Revisal, sec. 1951), to be applied to the discharge, *pro tanto*, of the note, and the judgment against the endorser. *Cuthbertson v. Bank*, 531.

2. *Usury — Equity — Forfeitures—Actions at Law.*—The principle that a court of equity will eliminate an usurious rate of interest from the debt when the suit is brought by the debtor for the penalty, upon his paying the principal sum and the legal rate of interest, does not apply to an action at law involving no equitable principle. *Ibid.*

3. *Usury — Nonresident Creditor — Statute of Limitations.*—An action against a nonresident creditor for the statutory penalty for charging usury (Revisal, sec. 1951), who has no agent here upon whom process may be served, is not barred by the statute of limitations, nor does the fact in this case that one of the plaintiffs is a nonresident and the other has changed his residence affect the matter. *Ibid.*

VARIANCE. See Contracts, 12; Pleadings, 1.

VENDOR AND PURCHASER.

1. *Vendor and Purchaser—Conditional Sales—Registration—Bankrupt—Court—Trustee—Interpretation of Statutes.*—By the amendment to the Bankrupt Act enacted by Congress in 1910 the title to the bank-

VENDOR AND PURCHASER—*Continued.*

rupt's property is vested in his trustee, "with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," and such trustee coming, therefore, within the provisions of Revisal, sec. 938, conditional sales contracts, reserving title in the vendor, are not good as against such trustee, when the writing has not been recorded until after the title has passed to him. *Hence,* when the vendor of the bankrupt, reserving title to the property sold, does not have his paper-writing recorded until after the property has passed to the trustee in the bankruptcy proceedings, the purchaser at the sale acquires a good title. *Hinton v. Williams,* 115.

2. *Vendor and Purchaser — Contracts of Sale — Stipulations — Right of Cancellation—Issues.*—Where the purchaser sues for damages for the seller's breach of contract in failing to deliver certain merchandise, and the defendant relies upon a provision of the contract giving him the right to cancel it upon receiving information unfavorably affecting the plaintiff's credit, an issue is too restrictive in its scope which confines the question to the receipt of this unfavorable information by the plaintiff, and, under the evidence in this case, an issue was properly submitted which also presented the question whether the defendant canceled the order in consequence of such information if such had been received by it. *Hardware Co. v. Buggy Co.,* 298.

3. *Vendor and Purchaser — Contracts of Sale — Right of Cancellation—Reasonable Time.*—A contract for the sale and delivery of merchandise providing that the seller would have the right of cancellation after the acceptance of the order, implies that this right of cancellation must be exercised within a reasonable time and, ordinarily, before the time stated for the performance of the contract of delivery by the seller. *Ibid.*

4. *Vendor and Purchaser—Contracts—Inherent Defects—Repair—Breach of Warranty—Damages.*—Where an engine is sold to run a certain kind of machinery and is guaranteed to be of good material, and "any parts proving defective within one year after date of shipment will be replaced free," if investigation shows that is made necessary by inherent defects of material or workmanship, but that the seller assumes no liability for damage or delays caused by such defective material or workmanship, the terms of the guarantee will be construed to reasonably effectuate the intention of the parties, which is, that where the defects of the engine are discovered by its intended use, and the seller has attempted and failed to remedy the defects, so that the engine thereafter fails to do the work contemplated, the terms of the guarantee excluding the liability will apply only to the original defects, and damages sustained by the buyer for failure of the seller to properly remedy them are recoverable under the terms of the contract. *Fairbanks v. Supply Co.,* 315.

5. *Vendor and Purchaser—Contracts—Defects—Repair—Warranty—Reasonable Time.*—Where the contract of sale of an engine is against inherent defects, which the seller agrees to remedy after discovered, upon notice from the buyer, and such defects are discovered and notice duly given, the warranty, by its terms, implies that the seller will make good his guarantee within a reasonable time. *Ibid.*

6. *Same—Waiver.*—Where the seller of an engine guarantees that he will remedy any inherent defects thereof upon notice, and, after receiving

VENDOR AND PURCHASER—*Continued.*

such notice, he attempts to remedy them and fails therein, he waives the stipulation for "substituting good for bad parts," and the buyer is then remitted to his general right to recover the damages he has sustained by reason of the breach of the contract. *Ibid.*

7. *Same—Principal and Agent—Ratification.*—Where the seller of an engine has failed to make good certain parts thereof which have been proven inherently defective, and which his guarantee provided that he would do, but without further responsibility, testimony on behalf of the buyer that the credit man of the seller induced him to give the note sued on and make a cash payment, under promise that the defects existing would shortly be remedied; that the seller received the money and the note with knowledge of the transaction, is evidence of his waiver of the stipulations in the warranty and a ratification of the act of his agent. *Ibid.*

8. *Contracts — Vendor and Purchaser — Agreement of Purchase.*—Where the seller of certificates of stock in a corporation agrees with the purchaser that if at the end of a year the latter was not satisfied therewith the former would return a deed he held as security for the purchase price and release the latter from all obligations in the transactions, agreeing to return the purchase price: and it appears that the purchaser was satisfied with his purchase for more than a year, and then brings his action: *Held*, the plaintiff cannot recover under the intent and meaning of the contract as gathered from its terms. *Makuen v. Elder*, 510.

VENUE. See Receivers, 1.

Venue—Irregularity—Pleas—Waiver.—A plea to the merits by a defendant to an action waives irregularity in the venue thereof. The plea should be made in apt time, and comes too late after judgment. *Brown v. Harding*, 253.

VERDICT. See Appeal and Error, 16, 31; Contracts, 5; Courts, 3; Deeds and Conveyances, 16; Pleadings, 9; Statutes, 9; Constitutional Law, 2.

WAIVER. See Carriers of Goods, 1, 8; Commerce, 3; Contracts, 11; Criminal Law, 10; Insurance, 15, 16; Parties, 1; Receivers, 1; Reference, 5; Removal of Causes, 1, 3; Vendor and Purchaser, 6; Venue, 1; Constitutional Law, 2.

WAREHOUSEMEN. See Carriers of Goods, 9.

WARRANTS. See Criminal Law, 8; Vendor and Purchaser, 5; Arrest, 1.

WARRANTY. See Contracts, 12; Deeds and Conveyances, 11.

WAY OF NECESSITY. See Easements, 1.

WILLS. See Courts, 2; Estates, 4, 5; Limitation of Actions, 2, 5; Trusts and Trustees, 2.

1. *Wills—Estates for Life—Heirs of Living Persons—Children—Remaindermen—Interpretation of Statutes—Rule in Shelley's Case.*—A devise of lands to the widow of the testator for life, then to the heirs of his son J., and it appears that the son was living at the time and had living children at the death of the testator and one born thereafter,

WILLS—*Continued.*

during the continuance of the life estate: *Held*, the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it will include all who are members of the class and fill the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, takes his share with the other children of J. Revisal, sec. 1583. *Cooley v. Lee*, 18.

2. *Wills — Probate — Effectiveness—Date of Death of Testator—Heirs at Law — Deeds and Conveyances — Equitable Limitations of Actions—Statutes.*—While it is provided by our statute, Revisal, sec. 3139, that a will shall not be effective to pass real or personal estate "unless it shall have been duly proved and allowed in the probate court of the proper county" and recorded in clerk's office, etc., there is no statute of limitations as to when a will may be admitted to probate, our registration act, Revisal, sec. 980, not being applicable; and the probate, when proved, allowed and recorded, as the statute requires, becomes effective and relates back to the death of the devisor, passing the title from that date, avoiding all disposition or conveyances of the property by the heirs contrary to the provisions of the will, unless the claimants are protected by the statute of limitations or some recognized equitable principle. Chapter 219, Laws of 1915, amending Revisal, sec. 3139, regarding the rights of innocent purchasers for value, etc., is inapplicable to this case. *Ibid.*
3. *Wills — Life Estates—Remaindermen—Possession—Deeds and Conveyances—Limitation of Actions.*—Where the tenant for life conveys his interest in the lands devised to him, and the grantee also holds under a deed from one of several remaindermen and is in possession of the lands, such occupation is not wrongful or hostile to the title of the other remaindermen until the life estate has fallen in, and the statute of limitations will not begin to run against their title until then. *Ibid.*
4. *Wills — Caveat — Undue Influence.*—The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not have otherwise made, or a substitution of the mind of the person exercising the influence for the mind of the testator. *In re Mueller's Will*, 28.
5. *Same — Trials — Evidence — Questions for Jury.*—In an action to set aside a will for undue influence, evidence thereof is sufficient to be submitted to the jury which tends to show that the testator made the will when at the home of his sister-in-law, when old and in a dying condition of cancer of the liver, giving all of his property to his sister-in-law and her husband, making the latter sole executor, disinheriting his children and revoking a former will made in favor of his children; that the will was made several days before the testator's death and shortly after he came to the home of the beneficiaries thereunder, one of them sending for and paying the attorney who wrote the will, the attorney testifying that the testator directed him to make the will in accordance with the desires of the beneficiaries named therein, who were present at the time; the children of the testator being absent; that there was no evidence that the relationship between the testator and his children was not friendly. *Ibid.*

WILLS—*Continued.*

6. *Wills—Probate—Relating Back — Judgment — Execution Sales—Innocent Purchaser — Deeds and Conveyances — "Color" — Limitation of Actions.*—The principle that a proceeding to establish a last will is a proceeding *in rem*, and that when the will is established it relates back to the death of the deceased owner and vests the title to the property in his devisee, cannot operate to affect the title to lands acquired by an innocent purchaser for value without notice, who has acquired his deed under a judgment against the one under whom his adversary party claims title, and has been in possession of the lands for more than seven years under his deed as color of title. *Stelges v. Simmons*, 42.

7. *Wills—Caveat — Separate Issues — Judgments — Sufficiency as to One Issue—Appeal and Error.*—In this action to caveat a will, involving the questions of undue influence upon and the mental capacity of the testator at the time, the issues submitting separately these two phases with a third issue as to whether the paper-writing and every part thereof was the last will and testament of the deceased, are approved; and the negative answer of the jury to the second issue being free from error and sufficient for judgment in caveator's favor, errors of law committed by the court on the other two issues become immaterial. *In re Rawlings' Will*, 58.

8. *Wills — Mental Capacity—Evidence—Nonexpert Witnesses.*—Upon the issue of the mental capacity of the testator at the time he executed his will, the evidence necessarily takes a wide range, and the courts are liberal in allowing persons who were acquainted with the testator to give in evidence their opinion thereof; and witnesses who are not subscribing witnesses to the will are competent, though they are not expert in such matters, to testify to the mental condition of the testator if they have had adequate opportunity for observation and forming a judgment. *Ibid.*

9. *Wills—Mental Capacity — Evidence — Married Insane Person—Appeal and Error—Harmless Error.*—Upon the issue of the mental capacity of a testatrix in executing a will, evidence that she had theretofore married a man who had several times been an inmate of an insane asylum was harmless, and not prejudicial to the caveator. But were it otherwise, *semble*, it may be considered, with the other testimony in this case, as being some evidence of unsoundness of mind. *Ibid.*

10. *Wills—Mental Capacity—Trials—Evidence—Questions for Jury.*—Testimony of witnesses having had opportunity to observe the testatrix whose will is attacked for her mental incapacity at the time of its execution, that she was easily influenced, had tried to drown herself; that she was like a child six or seven years of age, her mind was like an imbecile; that she did not have, in their opinion, sufficient mental capacity to make a will, or know the kind and value of her property, etc., is held abundantly sufficient to sustain a judgment on that issue in the caveator's favor. *Ibid.*

11. *Wills — Mental Capacity — Evidence — Appeal and Error — Harmless Error.*—In this action to caveat a will, the introduction of the personal tax returns of the propounder, made two years after the death of the testator, is held to be harmless; and the introduction in evidence of conveyances, deeds in trust, etc., made by the testator to the propounder was for the purpose of showing confidential relations

WILLS—*Continued.*

arising under the issue as to undue influence, and not affecting the judgment sustained under the issue as to mental capacity of the testator. *Ibid.*

12. *Instructions—Wills—Mental Capacity—Trials—Burden of Proof—Appeal and Error—Harmless Error.*—Where the charge of the court to the jury, in an action to caveat a will, construed as a whole, clearly, unmistakably and properly shifts the burden of proof on the caveator to show the mental incapacity of the testator, exception to an isolated portion thereof, which standing alone would be erroneous, will not be sustained. *Ibid.*

13. *Wills—Disposition of Property—Statutory Regulations.*—The right to dispose of property by will is not a natural right, but one conferred and regulated by statute. *Peace v. Edwards*, 64.

14. *Same—Signature—Date—Subscribed.*—The testator's signature to the will is required by our statute, Revisal, sec. 3113, though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting appears in the body thereof, has the same legal effect as those bearing dates and subscribed by the testator. *Ibid.*

15. *Same—Several Wills—Conflicting Disposition of Property—Intestacy.* Where the decedent has left several paper-writings purporting to be his last will, containing the opening declaration, as to each, that the testator made the same as his "last will and testament," but only one of them bears date and his name subscribed thereto, and each of them making a disposition of his property different from the other, the undated and unsubscribed wills have the same legal effect as the one dated and subscribed, though the testator had endorsed under his signature thereon the words "last will"; and in the absence of proof as to which of the wills was the last one, the legal effect is intestacy. *Ibid.*

16. *Wills—Statutory Rights—Witnesses—Presence of Testator.*—The right to testamentary disposition of property rests on statute, which among other things provides that when the paper offered for probate is not in the handwriting of the testator it shall be attested by witnesses who have subscribed the same in the presence of the testator. *In re Allred's Will*, 153.

17. *Same—Sight—Other Senses—Blind Testators.*—The requirement that a paper-writing offered for probate as a will shall be subscribed by attesting witnesses thereto in the testator's presence does not exclude the operation of the testator's senses other than sight; and a blind man may make a valid will when it appears that he requested the witnesses to sign as such, who did so at the time, in the same room in which the testator was sitting, a few feet from him; that one of the witnesses had written the will, read it over to the testator, item by item, and item by item the testator said it was right, the other witness, being present, then signing the will, as stated, in the presence of the other, who watched him do so. *Ibid.*

18. *Wills—Confidential Relations—Beneficiaries—Father and Son—Presumptions—Instructions—Trials—Questions for Jury.*—Where upon a caveat of a will the presumption of undue influence is relied upon as a presumption from the confidential relationship existing between

WILLS—*Continued.*

the testator and the beneficiary, *semble*, that this presumption would not obtain where the father is old and blind, depending upon his son, the beneficiary, who was living with and caring for him and his property. But were it otherwise, the evidence presents a question for the determination of the jury, and a request by caveator for a peremptory instruction is properly refused. As to whether this principle applies only as to gifts *inter vivos*, *Quære*. *Ibid.*

19. *Wills—Instructions—Undue Influence—Appeal and Error — Harmless Error.*—Where a will is sought to be set aside for undue influence upon the testator, and there is evidence tending to show such influence theretofore, so as to infer its existence at the time of its execution, an instruction by the court that the jury must find that it was exercised at the time is reversible error to the caveator's prejudice; but it appearing from the context of the charge in this case that it must have been operative at that time, no error is found. *Ibid.*

20. *Wills—Probate—Caveat—Statutes—Clerks of Court—Pleas and Quarter Sessions—Will Appearing of Record—Presumptions—Burden of Proof.*—The requirements of Revisal, sec. 3126, that the clerk of the Superior Court take in writing the proofs and examinations as to the execution of a will and to embody the substance thereof in his certificate of probate, and that the certificate thereof be recorded with the will, did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary. *Poplin v. Hatley*, 163.

21. *Same—Evidence—Rebuttal.*—Where a will valid upon its face is attacked for insufficiency of probate before the old court of pleas and quarter sessions, and it appears that therein an estate for life was granted to the testator's wife with remainder to two of testator's children, with a small bequest in money to the caveator; that the caveator was shown the will, received and receipted for the money devised, and the life tenant held possession of the land for her life, and since then the remaindermen have been in possession, without objection from the caveator; that the clerk of the court has not made sufficient search to find other entries bearing upon the validity of the will: *Held*, the evidence confirms the presumption in favor of the validity of the probate, instead of tending to rebut it. *Ibid.*

22. *Wills — Caveator Accepting Benefits — Estoppel.*—Where the caveator has been shown the will devising the testator's lands to another, and to her a bequest in money, and accepts the money and receipts therefor, after full knowledge of all the facts, she will not be heard to impeach the validity of the will. *Ibid.*

23. *Wills—Interpretation—Trusts and Trustees.*—The mother of the testatrix having previously devised to her in fee certain lands, and the testatrix, having died seized and possessed of this and other property, left a will which gave to her mother, about eighty years of age, "all the property recently deeded to me by her, also all my other property, that she may administer it to the use of my children." *Held*, by this devise, the mother took all of the property, that there-

WILLS—*Continued.*

tofore conveyed by her as well as that otherwise owned by the testatrix, to be administered for the benefit of the testatrix's children, without power of disposition by will or otherwise, except as may be conferred by legal proceedings instituted for that purpose; and evidence as to the close relation having existed between the testatrix and her mother has no effect upon the express terms of the devise and bequest. *Jarrell v. Dyer*, 177.

24. *Wills—Interpretation—Intent.*—Where the language used by the testator in writing his will clearly and explicitly expresses his intent in the disposition of his property, the intent, as thus gathered, is controlling, and nothing is left open to construction. The rules of interpreting a will discussed by WALKER, J. *Wooten v. Hobbs*, 211.

25. *Wills—Named Devisees—Survivors—Lapsed Devises—Descent and Distribution.*—When a legacy or devise is given in a will to certain children of the testator, then in being, by name, and any of them die befor the testator, those living will not take the share of the deceased one, as survivors, but the legacy or devise will lapse, and go, as property undisposed of by the testator, to the latter's next kin, unless otherwise provided by statute, or unless other disposition thereof be made by the will. *Ibid.*

26. *Wills — Interpretation — Children named Devisees — Codicil—Revocation—Entire Interest.*—A devise of lands to several of the testator's children by name, for life, with direction that if one or more of "my said children shall die without leaving child or children or issue of such, then his or their share or shares to the surviving child or children of such for life in the same manner as the original shares therein." By codicil, the testator revoked the devise to one of his children, L., "expressly withdrawing and recalling . . . the entire interest devised to him," devising the same to his other children, renaming them, for life, "subject to the same and identical rights, privileges and provisions as to the survivorship and limitations over," etc. L., the son, died without child since the death of the testator. *Held*, the devise to testator's children was not to them as a class, but individually, the interest of L. revoked by the codicil, being his entire interest in the devise, whether original, vested or contingent, which, in express terms, goes to the other of the testator's named children, who come within the terms of the devise to them. *Ibid.*

27. *Wills—Devises — Interpretation — Fee Simple — Restraint on Alienation.*—A conveyance of "the full use and control" of lands, without any limitation as to time, confers a fee-simple title, and a restriction thereon that the grantee shall not dispose of any part of the land unless she become a widow and her necessity requires it, and then only with the consent of the executor, is void as a restraint upon alienation. *Schwren v. Falls*, 251.

28 *Wills—Devises—Heirs of the Body—Rule in Shelley's Case—Deeds and Conveyances—Fee-simple Title.*—A devise of tract of a certain number of acres of land on the west side of another tract of certain acreage, which can be ascertained and identified (*Stewart v. Simonds*, 74 N. C., 519) under the terms, one half thereof to J. for life and the other half to M. "during her natural life and then to the heirs of her body," and at the death of J., then to M., and at her death all of the

WILLS—*Continued.*

tract "to the heirs of the body of M.": *Held*, under the rule in *Shelley's case* M. took the part devised to her in fee simple at the death of the testator, and likewise the other with life estate to J., in fee simple after his death; and a conveyance of the fee of the tract devised, joined in by J. and M., conveyed the fee-simple title to their grantee. *McSwain v. Washburn*, 363.

29. *Wills, Foreign—Correct Certificates—Lands.*—Objection to the introduction of a will in plaintiff's chain of title in an action to recover lands, situated in North Carolina, on the ground that the record from the Orphan's Court of Baltimore was not properly certified, is untenable, it appearing that the register and custodian of wills certified under seal that it was a true copy; the presiding judge that the certificate of the register is in due form, and the register certified under seal that the person signing the last certificate was the presiding judge of the court. *Smathers v. Jennings*, 601.

WITNESSES. See Evidence, 23; Wills, 8, 16; Courts, 6.